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SAINT LOUIS, SEPTEMBER 20, 1878.

CURRENT TOPICS.

In a recent Pennsylvania case, *Price v. Kirk*, 35 Leg. Int. 325, it was held that a claim by an architect for preparing drawings and specifications for a house, was not the subject of a mechanic's lien. The drawing of plans and specifications, of itself, is not "work" within the meaning of the statute—not work in the ordinary sense of the term. An architect is not a mechanic or laborer, and has no better claim to a lien than the scrivener who copies specifications or draws contracts for the building, or the surveyor who marks the plan upon the ground. In *Bank v. Grieser*, 11 Casey, 423, the court held that an architect who drew plans and specifications for a building, directed and superintended the work done in pursuance of them by the various mechanics, inspecting materials, examining accounts, countersigning orders, and generally occupying the builder's place, and discharging his duties throughout, performed "work about the erection or construction of the building," and included the drawing of plans and specifications necessary to enable him to perform this work within the act. See, also, *Penn. R. v. Leuffer*, 5 Cent. L. J. 74, as to civil engineers; also 6 Cent. L. J. 182.

The case of *Gorham v. Gross*, lately decided by the Supreme Judicial Court of Massachusetts, raised the question of the liability of a person who has built a party wall for the negligence of contractors, to whom the work was intrusted, in building the same. By an indenture between the parties, either was authorized to build a party wall of brick with a stone foundation, half on the land of each, half the cost of which should be paid by the other if he used it. The defendants made a contract with a firm of masons, by which the latter were to furnish all the material and labor in completing the stone and brick work, according to the plans and specifications, and under the superintendence and to the acceptance of an architect, who was called

in this contract, and was, in fact, the agent of the defendants. The masons built the wall and did everything that they were required by their contract to do to it; the architect surveyed and estimated the work, and gave them a certificate therefor, which by the contract entitled them to their pay. After the wall had been so completed by the masons and accepted by the defendants, it fell and crushed the building and property upon the adjoining lot of plaintiff. The plaintiff offered evidence tending to show that the fall of the wall was occasioned by negligence in building it without sufficient stays or supports, or in building it in such cold weather that the mortar froze as soon as laid, and was afterwards softened by a sudden thaw. The jury were instructed that if the accident was caused by such negligence the defendant would be liable, although it was the negligence of the masons in executing their contract. Upon exceptions to the supreme judicial court, this instruction was held correct and sufficiently favorable to the defendants. In their opinion the court say: "Assuming that the relation of the masons to the defendants was that of contractors, the former alone would be responsible to a third person for any injury caused by their negligence in a matter collateral to the contract, as, for instance, in depositing materials, handling tools, or constructing temporary safeguards, while doing the work; but where the very thing contracted to be done is improperly done, and causes the mischief upon the land of another, the employer is responsible for it, at least where it occurs after the structure has been completed to his acceptance." The case of *Fletcher v. Rylands*, L. R. 1 Ex. 265, 279; s. c. L. R., 3 H. L. 330, 339, 340; *Shipley v. Fifty Associates*, 106 Mass. 194, 198; *Chauntler v. Robinson*, 4 Exch. 163, 170, and *Nichols v. Marsland*, L. R. 10 Ex. 259, 260, 2 Cent. L. J. 523, were cited and relied upon.

THE Tennessee Ku-klux act of 1869-70 (Code 4770 b,) provides that if any person or persons "disguised or in mask, by day or by night, shall enter upon the premises of another, or demand admission into the house or inclosure of any citizen of this state, it shall be considered *prima facie* that his or their inten

tion is to commit a felony, and such demand shall be deemed an assault with an intent to commit a felony; and the person or persons so offending shall, upon conviction, be punished by imprisonment in the penitentiary not less than ten years nor more than twenty years." In *Walpole v. State*, decided at the last term of the supreme court of that state, it was held that the prisoner, who had gone upon the premises in a disguise for the purpose of stealing chickens, was properly convicted under this act. SNEED, J., said: "It is apparent that the object of this statute was to repress a great evil which arose in this country after the war, and which grew to be an offense of frequent occurrence—that of evil-minded and mischievous persons disguising themselves to terrify or to wrong those who happened to be the object of their wrath or resentment. This was a kind of mob law, enforced sometimes by a multitude of vagabonds, which grew to be a great terror to the people, and placed human life and property at the mercy of bad men whose crimes could scarcely ever be punished, because of the disguises under which they were perpetrated. There were laws already sufficiently rigorous and severe for the due punishment of any and all offenses which might be committed without disguise, and this act of 1869-70 was intended to strike at offenses committed in masquerade; to make these more highly penal, because of the inherent difficulty of identifying offenders, who wore masks in order to secure immunity from detection. The mere entry in disguise upon the premises of another is made *prima facie* evidence of an intention to commit a felony, and this of itself is a substantive offense from which there is no escape, except by proof that there was in fact no purpose to commit crime. In this case, we have not only the *prima facie* case, but the conclusive case of an intent to commit a felony by the confession of the prisoner." See, also, *State v. Box*, (Jackson, 1875), not yet reported, where the same court said: "We are of opinion that the statute makes it a felony to enter upon the premises of another disguised or in mask; and to demand in masks or disguise entrance or admission into the house of another is likewise a felony; and to demand entrance into his inclosure, masked or disguised, is a felony; and the person or persons doing either of said acts subjects himself to the penalty prescribed in

the statute." "The penalties for a violation of this law," says the learned judge in conclusion, "are severe, but they have proved themselves wholesome in the partial suppression already of one of the greatest of the disturbing elements of social order in this state."

THE case of *Mott v. Consumers Ice Co.*, recently decided by the New York Court of Appeals, is a leading case on a question of law lately much discussed in these columns, viz, the liability of a master for the willful acts of his servant. See 6 Cent. L. J. 281, 412, 483; 7 Cent. L. J. 82. While the plaintiff was driving along a street in his carriage, one of the company's ice wagons was driven against his, throwing him out and severely injuring him. The court below dismissed the complaint, on the ground that the driver's act was willful, and the company was therefore not liable. On appeal, this judgment is reversed. The rule recognized in all the recent cases, and which does not materially conflict with any of the older decisions, although it may qualify some of the intimations and casual expressions or illustrations of the judges is, that for the acts of the servant within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible whether the act be done negligently, wantonly, or even willfully. In general terms, if the servant misconducts himself in the course of his employment, his acts are the acts of the master, who must answer for them. There are intimations in several cases of authority that for the willful acts of the servant the master is not responsible. *McManus v. Crickett*, 1 East., 106; *Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y., 455; *Wright v. Wilcox*, 19 Wend., 343. But these intimations are subject to the material qualification that the acts designated "willful" are not done in the course of the service, and were not such as the servant intended and believed to be for the interest of the master. In such case the master would not be excused from liability by reason of the quality of the act. *Limpus v. London Gen. Omnibus Co.* 1 H. & C., 526; *Seymour v. Greenwood*, 6 H. & C., 359, affirmed 7 Id., 355; *Shea v. Sixth Avenue R. R. Co.*, 62 N. Y., 180; *Jackson v. Second Avenue R. R.*

Co., 47 Id., 274. But if a servant goes outside of his employment and without regard to his service, acting maliciously, or in order to effect some purpose of his own, wantonly commits a trespass or causes damage to another, the master is not responsible; so that the inquiry is whether the wrongful act is in the course of the employment or outside of it and to accomplish a purpose foreign to it. In the latter case the relation of master and servant does not exist so as to hold the master for the act. *Croft v. Allison*, 4 B. & Ald., 590; *Wright v. Wilcox*, *supra*; *Vanderbilt v. Richmond Turnpike Co.*, 2 Comst., 479; *Male v. Lord*, 39 N. Y., 481; *Fraser v. Freeman*, 43 Id., 566; *Higgins v. Watervliet T. Co.*, 46 N. Y., 23; *Rounds v. D. L. & W. R. R. Co.*, 64 N. Y., 329; *Isaacs v. Third Avenue R. R. Co.*, 47 Id., 122. When the defense is that the wrongful act was not within the general scope of the servant's employment, and so not within the express or implied authorization of the master, it is for the court to pass upon the competency of the evidence, and for the jury to give effect to it. *Seymour v. Greenwood*, *supra*; *Courtney v. Baker*, 60 N. Y., 1; *Jackson v. Second Avenue R. R. Co.*, *supra*; *Rounds v. D. L. & W. R. R. Co.*, *supra*.

CONDITIONS IN RESTRAINT OF MARRIAGE.

There is some conflict of authority as to the law relating to the clause of a will containing conditions in restraint of marriage. In *Stockpole v. Baumonti*, 3 Vesey, 89, Lord Loughborough said that, "the authorities stand so well ranged on either side that the court would not appear to act too boldly whatever side of the proposition they should adopt." It is to be regretted that the learned Chancellor did not endeavor to make his own opinion more a source of light upon a dark subject, than a stricture upon his predecessors. As for this decision, it leaves us to accept as the law the unequivocal utterance of Lord Mansfield in *Long v. Dennis*, 4 Burr. 2050, where it is said: "Conditions in restriction of marriage are odious, and therefore held to the utmost rigor and strictness. They are contrary to sound policy. By the Roman law they are all void. In cases of conditions subsequent it has been established by precedent, that when the estate

is not given over, they shall be considered as only *in terrorem*." In Jarman on Wills, Vol. 1, p. 711, occurs the following text: "In regard to devises of real estate, it seems to be generally admitted (though the point rests rather on principle than decision) that unqualified restrictions on marriage are void on grounds of public policy." We think the text writers and courts of this country more generally accept than reject the foregoing as the law: Story, 1st Equity Jur. 291, says: "It has been attempted in some American states to maintain even that such conditions do not apply to real estate at common law, and sometimes even that conditions in restraint of marriage are valid at common law. But no such principle is fairly maintainable." Mr. Redfield, the author of the later revisions of Story's Equity Jur., adopts this view in his work on Wills, Vol. 2, p. 294, and, from the citations, we have a right to infer that neither of these writers accept as the law, *Phillips v. Medbury*, 7 Conn. 568, and *Commonwealth v. Stauffer*, 10 Penn. St. 350. In Willard's Eq. Jur., 526, the text is in accord with Story and Redfield. In *Parsons v. Winslow*, 1 Mass. 169, Sedgwick, J., held a devise during "life and widowhood" void. This case is criticised by Leonard, J., in *Dumey v. Schaffler*, 24 Mo. 170, wherein he combats the doctrine laid down by the text writers hereinbefore quoted, and accepts as the law the doctrine laid down in *Phillips v. Medbury*, and *Commonwealth v. Stauffer*, *supra*.

In these three cases wherein it is supposed the general doctrine laid down by the text writers is antagonized, we do not regard the decision as resting so much upon a distinctly defined principle as upon the circumstances of each of the particular cases. In each case the condition in restraint of marriage was held to be a reasonable condition, based on the hypothesis that a father's desire to preserve to his widow and children, the estate he had left them should be respected and held up as a barrier between some probable improvident future husband and stepfather. The interests of the children seem more to have been considered than the freedom of the widow to act as she chose.

The cases of *Hughes v. Boyd*, 2 Sneed, 512, and *Hawkins v. Skaggs*, 10 Humph. 10, cited by the American editor of Jarman as main-

taining a doctrine contrary to that laid down in the text certainly do no such thing. In the former case the court said: "It is, however, everywhere agreed that conditions in restraint of marriage are void, and others which are apparently so are not." It that case it seemed to be a question whether the clause in the will under consideration contained a condition in restraint of marriage, and it was held that it did not. To the same effect was the case of *Hawkins v. Skaggs*, *supra*.

There is a well defined distinction between an estate devised to a wife during her widowhood, and an estate devised to her for life, conditioned that she shall not marry. The former is a limitation which the courts uniformly uphold. The distinction between cases wherein the clause in the will was a limitation, and wherein it was a condition in restraint of marriage, should be regarded, although it has not been. As supporting the doctrine laid down in *Dumey v. Shaffler*, *supra*, by Leonard, J., the cases of *Vance v. Campbell*, 1 Dana. 230, and *Pringle v. Dunkley*, 14 S. & M. (Miss.) 11, are cited; but in the former case the court said the clause in the will under consideration was not a condition in restraint of marriage, but only an allowable limitation, and in the latter case where the devise was to the wife "so long as she remained a widow," the court said this was a limitation and not a condition in restraint of marriage; and so held the court in *Harmon v. Brown*, in Indiana, in a recent case not yet reported. The case of *Dillard v. Connolly*, 3 Cush. 230, is certainly not a well considered case. The sole inquiry of the court seems to have been to ascertain the intention of the testator, and carry it out without reference to the rule laid down by all writers that the intention of the testator shall be carried out where it can be done consistently with the rules of law.

In some of the states this question is relieved of much of its embarrassment by statutory enactment. In Indiana (2 G. & H. 552) the statute provides that a "devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void." A limitation of a devise during widowhood was held not within this statute. *Harmon v. Brown*, *supra*. The conflicting decisions in those states where there is no enactment on the subject, have served to surround the subject of this discussion with difficulties;

but we think it safe to conclude that the weight of authority in this country favors the doctrine laid down by Lord Mansfield in *Long v. Dennis*, and by Sedgwick, J., in *Parsons v. Winslow*. And that the courts of this country will *only* consent to uphold conditions of a will in restraint of marriage, when from the circumstances of the particular case the condition is deemed reasonable, and that in no instance do they wish to be considered as not in harmony with the text-writers on this subject. W.*.*.

JUDGMENT LIEN DESTROYED BY DISCHARGE IN BANKRUPTCY.

WITHERS v. STINSON.

Supreme Court of North Carolina, June Term, 1878.

HON. W. N. H. SMITH, Chief Justice.

" EDWIN G. READE,
" W. B. RODMAN, } Associate Justices.
" W. P. BYNUM,
" W. T. FAIRCLOTH, }

A LIEN by judgment is destroyed by a discharge in bankruptcy of the judgment debtor.

This was an application for the issuance of an execution upon a judgment theretofore obtained by plaintiff against the defendant, presented to Erwin, probate judge of Mecklenburg county, upon the following facts agreed: The judgment was rendered in 1871, in Mecklenburg Superior Court, and immediately thereafter duly docketed in the county of Iredell, whereby it, *proprio vigore*, became a lien upon the real estate of the defendant in that county. The defendant, at the time of such docketing, owned real estate situate in said county of Iredell, and had owned the same continuously from the year 1859. The debt upon which the judgment was predicated was created before the late war. Under an execution issued on that judgment, the said real estate was allotted to the defendant as a homestead, pursuant to the law of North Carolina, as then expounded by her highest court, giving to the homestead a retroactive effect. In 1872 the defendant went into bankruptcy; the plaintiff, though notified, failed to prove his debt, and in 1873 the defendant was duly discharged as a bankrupt, and set up that discharge as a bar to the application. The plaintiff having failed to keep his execution alive was compelled, under the laws of North Carolina, to make this application to revive.

Judge Erwin, after taking an *advisari*, refused the application and dismissed the proceedings. From this ruling an appeal was taken to the judge then presiding in the Superior Court of Mecklenburg (Hon. W. R. Cox), who reversed the ruling of Judge Erwin and ordered execution to issue. From this ruling the defendant appealed to the supreme court.

Jones & Johnston, for plaintiff, cited *Eyster v. Gaff*, 91 U. S. 521, 3 Cent. L. J. 250, and *McHenry v. La Societe Francaise*, 95 U. S. 58; *Shipp & Bailey*, for defendant, while conceding that *specific* liens were preserved in bankruptcy contended that the lien by judgment was a *general* lien destroyed by the destruction of its principal, or if otherwise that the creditor should have proceeded under leave or direction from the bankruptcy court, and pending the case therein. *Blum v. Ellis*, 73 N. C. 293; s. c. 13 B. R. 345.

BYNUM, J., delivered the opinion of the court:

It was admitted by the counsel for plaintiff that the case of *Blum v. Ellis*, 73 N. C. 293, was a decisive authority against him; but he seeks, in a well-prepared and considered argument, to induce the court to reconsider and reverse that decision. *Blum v. Ellis* was a well-considered case, upon a review of the conflicting decisions of other courts up to that time. The importance of adhering to decisions once solemnly made, and thus preserving a uniformity in the law, can not be overestimated, and nothing less than a clear conviction that the decisions are erroneous, and ought to be overruled, will justify a departure from them.

Such a conviction has not been produced upon our minds by the able argument and the authorities of the plaintiff's counsel. Nor can the court, other things being equal, lose sight of a train of evils which must follow a reversal of that decision; evils which could not well be foreseen by debtors or creditors who alike supposed, and had the right to suppose, that a discharge in the court of bankruptcy was a final discharge from all preceding debts then provable.

There is error. Judgment reversed, and proceedings dismissed.

NOTE.—The syllabus in *Blum v. Ellis* is as follows: The bankrupt law does not divest a lien; but as all the property of a bankrupt, as well that subject to mortgages and liens, as that which is unincumbered, passed to the assignee, and is in *custodia legis*, subject to priorities and liens, it follows that the bankrupt court is the proper tribunal for the enforcement of liens.

NEGOTIABLE PAPER AS COLLATERAL SECURITY.

RICHARDSON V. RICE.

Supreme Court of Tennessee, April Term, 1878.

HON. JAMES W. DEADERICK, Chief Justice.

" ROBT. MCFARLAND,	} Associate Justices.
" PETER TURNERY,	
" J. L. T. SNEED,	
" T. J. FREEMAN,	

NEGOTIABLE paper transferred as collateral security before maturity is subject to all equities existing at the time of transfer; and the maker is protected if, before such transfer, he has paid the note to the rightful holder. Distinguishing *Gosling v. Griffin*, Mss. Jackson, 1875, which overrules *Vatterlien v. Howell*, 5 Sneed, 441.

DEADERICK, C. J., delivered the opinion of the court:

Rice, Stix & Co. recovered a judgment in the Circuit Court of Crockett County against W. B. & H. H. Richardson, from which they have appealed to this court. The suit originated before a justice of the peace, upon a note executed by plaintiffs in error to defendants in error, and was payable at the office of Dickinson, Williams & Co., and seems to have been endorsed by Rice, Stix & Co., and delivered to Dickinson, Williams & Co., and by them transferred by delivery to the Merchants' National Bank at Memphis as collateral security for subsisting indebtedness of it, and future advances to be made to Dickinson, Williams & Co., and was finally transferred to the Metropolitan National Bank, New York, for whose use this suit is now prosecuted. The defence is, that the note was paid while held by Dickinson, Williams & Co., to them and before its maturity.

Upon the trial, the defendants, among other things, requested the court to charge the jury, that if the defendants paid the note to Dickinson, Williams & Co., before it fell due and while they were holders of it, and before its transfer to the Merchants' National Bank as collateral security, they should find for the defendants. This, as well as all the other requests to charge several other propositions submitted by defendants, the court refused, saying to the jury that he charged the reverse of said several propositions. After the jury had retired they returned into court and asked: "If the note was paid by defendants before due to Dickinson, Williams & Co., while they were the holders of it, how should they find?" The court instructed them that such a payment would not exonerate defendants; that unless they made the payment *after the note fell due*, and before it was transferred by Dickinson, Williams & Co. to the Merchants' National Bank, the judgment would be no protection to them.

In the case of *Gosling v. Griffin*, decided at this place, November, 1875, (Jackson), a special judge delivering the opinion of the court, it was held that the maker of negotiable paper is not discharged if, before its maturity, and *after its transfer, even as collateral security*, he makes payment to any other than the real holder. The case of *Vatterlien v. Howell*, 5 Sneed, 441, in which it was held that in such case, unless the holder gave notice to the maker of the transfer, such payment would be valid, was reviewed and overruled; and it was held that "negotiable paper taken as collateral security for pre-existing indebtedness, before maturity and before any equities exist against it, must stand upon the same footing as the transfer of overdue paper." The holder in neither case is considered a holder for value in due course of trade under the law merchant, and both are subject to all equities existing at the time of the transfer, but neither is subject to defences arising after such transfer. Following the authority of the case cited, we hold that it was error to refuse to charge the law as requested as hereinbefore stated, and to charge the jury as was done by the court in answer to the question submitted to the court by the jury.

The judgment will be reversed and the cause remanded for a new trial, under proper instructions to the jury.

A motion was made in the circuit court and renewed here to dismiss the appeal, upon the ground that the bond for appeal was not executed within the time allowed by law. The failure to give the bond within the prescribed time for the appeal from the justices' judgment to the circuit court, was the consequence of the agreement of the adverse party to allow further time, and they thereby waived any right to take exceptions on account of such failure, and the motion to dismiss was properly overruled by the circuit court.

FOREIGN CORPORATIONS — POWER TO PURCHASE AND HOLD REAL ESTATE.

UNITED STATES MORTGAGE CO. v. GROSS.

Supreme Court of Illinois,

[Filed at Ottawa, June 21, 1878.]

HON. JOHN SCHOLFIELD, Chief Justice.

<p>"SIDNEY BREESE, "T. LYLE DICKEY, "BENJAMIN R. SHELDON, "PICKNEY H. WALKER, "JOHN M. SCOTT, "ALFRED M. CRAIG,</p>	<p>} Associate Justices.</p>
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1. THE RULE THAT FOREIGN CORPORATIONS can not purchase and hold real estate in this state does not apply to corporations created for the purpose of loaning money on real estate securities.

2. WHERE THERE IS NO CONSTITUTIONAL INHIBITION, the legislature has a right to pass statutes which reach back to and change or modify the effect of prior transactions.

3. THE CASE OF *Carroll v. East St. Louis*, 67 Ill. 568, explained.

BREESE, J., delivered the opinion of the court:

This was a suit in equity to establish a first lien upon certain premises mortgaged to complainant, and for the further purpose of having declared void a certain mortgage on the same property in favor of "The United States Mortgage Co.," a corporation created by the laws of the State of New York, and whose place of business was in the city of New York, on the ground that this company is, and was at the time the mortgage was executed, a foreign corporation organized under the laws of the State of New York, and having no legal existence in this state. There are other points in the case, the facts of which are voluminous, but they are of minor importance.

In the argument of these cross-errors it seems to be insisted that the same principles found in the case of *Carroll v. East St. Louis*, 67 Ill. 568, are in this case and it must be decided in the same way. That would certainly be the result if the cases were analogous. We perceive no resemblance in the cases. In the case cited a foreign corporation was created for the express purpose of purchasing and selling real estate—that was the main, if not the

whole object of the incorporation. This court held such a corporation had no such power to be exercised in this state, such exercise being against the general policy of our legislation in respect to incorporations created by the authority of this state, and tended to create perpetuities, and this policy must be determined by reference to its general legislation either by prohibitory or creating acts, or by its general course of legislation on the given subject. The point of the decision is, such purchasing and holding tended to create perpetuities which were considered abhorrent to our institutions and policy.

We do not perceive any element of that nature in this transaction. Here is a corporation created by the laws of the State of New York, we will concede for the purpose of loaning money on mortgage. By no possibility could a perpetuity result from the transactions of such an incorporation, whether we regard the mortgages taken as conveying the title or as a mere incident to the debt it is assigned to secure. But it is urged that such a corporation, for the purpose of loaning money on real estate security, could not at the time of this transaction be created by the laws of this state, and reference is made to the general incorporation act of 1872 as found in the revised statutes of 1874, chap. 32, title "Corporations." Section 1 of this act declares that corporations may be formed in the manner provided by this act for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money. Section 26 is also cited, which subjects foreign corporations and its affairs and agents doing business in this state to all the liabilities, restrictions and duties imposed upon domestic corporations of like character organized under the laws of this state, and shall have no greater powers, and no foreign or domestic corporation established for the pecuniary profit of its stockholders or members shall purchase or hold real estate in this state, except as provided for in this act. p. 290.

This last section quoted is aimed at the evil in *Carroll v. East St. Louis*, *supra*, deprecated, as such purchasing and holding would tend to create perpetuities, but we do not think it was designed to apply to securities taken by way of mortgage; for the act seems to contemplate such securities will be taken, and provides for offering the real estate thus acquired for sale at stated periods. But we must yield to the suggestion that by section one no corporation, domestic or foreign, could be organized, the loaning of money being its chief business. We cannot say, in view of the legislation, that state courts should acknowledge such an organization by a foreign state, and hold its acts valid in this state.

But it is urged by appellant, if this be so, the general assembly, by an act passed in 1875, obviated this objection and removed the difficulty. That act provides that any corporation formed under the laws of any other state or country, and authorized by its charter to invest or loan money, may invest or loan money in this state; and any such corporation that may have invested in or lent money as aforesaid, may have the same rights and powers

for the money thereof, subject to the same penalties for usury as private persons, citizens of this state; and when a sale is made under any judgment, decree or power in a mortgage or deed, such corporation may purchase, in its corporate name, the property offered for sale, and become vested with the title, wherever a natural person might do so in like cases. Laws 1875, p. 65.

This statute, on its face, manifests a design to change the policy announced in *Carroll v. East St. Louis*, *supra*, and is retroactive in its terms, and liable to none of the objections urged against it. Retrospective or retroactive statutes are not usually regarded with much favor by courts, but exigencies may arise in the life of every community rendering such laws necessary to promote justice, and avoid injury to the innocent. Some courts have held that all such laws are not obnoxious to constitutional objection, while others hold they are absolutely void. The settled opinion, we believe to be, when there is no constitutional inhibition, the legislature has a right to pass statutes which reach back to, and change or modify the effect of prior transactions. It is a general rule, and a safe one, that a statute should have a prospective operation only, unless the terms show clearly a legislative intention that it should operate retrospectively. The act of 1875, having the decision of the court in view made in 1873, declared that foreign corporations might loan money, and when they had loaned money they might collect it as natural persons. Clearly this statute, by its very words, reaches back, it being deemed necessary to remedy a supposed existing evil.

It is said by Cooley in his treatise on Constitutional Limitations, that when such acts go no farther than to bind a party by contract, which he has attempted to enter into but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality or in consequence of some ingredient in the contract forbidden by law, the question they suggest is one of policy and not one of constitutional power. p. 374. There are many cases to be found where the courts have so held, and legislative acts validating invalid contracts, have been sustained. This court said in *Mitchell v. Deeds*, 49 Ill. 416, that the legislature had the same power to ratify and confirm an illegally appointed corporate body that it had to create a new one. So, here, the legislature could originally have granted the power to foreign corporations to loan money, therefore they have the power to ratify the act when done, without the power to do it when done. We have often examined the authorities on this subject of retrospective legislation, and we think the fair conclusion is, that the legislatures of the several states have power, except when prohibited by the local constitution, to enact retrospective statutes in certain cases, and it belongs to the courts to determine whether such acts come within the spirit of the constitution of the United States, which limits the legislative power, and whether the effect of such statutes interferes with vested rights.

We perceive no clashing with any constitutional provision by this statute, nor does it interfere to

divest any vested right, but promotes justice and compels a party to perform his contract as he made it. The court therefore decided correctly in sustaining the power of appellants to the money and to take the mortgage, and that the same was a valid and first lien on the premises.

REMOVAL OF CAUSES.

RE FRASER.

United States Circuit Court, Eastern District of Michigan, August, 1878.

Before Mr. JUSTICE SWAYNE.

1. AN APPLICATION FOR REMOVAL of a cause can not be made to an appellate court. Therefore, the application in this case should have been made before the decree of the probate court was entered and the appeal taken; and not having been so made is too late.

2. THE WORD "PARTY" in the act of 1875 is collective, and means all the plaintiffs and all the defendants; all on each side must be "citizens of different states" from those on the other side.

3. A FEDERAL COURT has no jurisdiction in proceedings to establish a will.

The will of A. D. Fraser was contested in the Probate Court of Wayne county, by six of his heirs at law, four of whom were citizens of Michigan, and the remainder citizens of other states. The proponents of the will were also citizens of Michigan. The probate court, after a hearing, made a decree admitting the will to probate; whereupon the resident and non-resident citizens took their separate appeals therefrom to the circuit court for the county of Wayne. On the perfection of the appeals the usual order was made by the court in both of them, that issues of fact be found—viz., as to the sanity of Mr. Fraser and due execution of the will.

On motion of the proponents the circuit court ordered that the two appeals and issues be heard as one case, the issue in each being the same. Before this order, and after the case was ready for hearing, the non-resident contestants filed their petition and bond, under the act of Congress, for the purpose of removing their appeal to the Circuit Court of the United States for the Eastern District of Michigan.

The proponents thereupon made a motion in the United States court to remand the record to the state court. In the meantime, the defendants applied to the Supreme Court of Michigan for a *mandamus* to set aside the order of consolidation made by the state court. It was refused, upon the ground that there was but one issue, and that the several appeals constituted but one suit. See *People v. Wayne*, 7 Cent. L. J. 179. During the argument before Mr. Justice Swayne, at Detroit, it appearing that the record of the appeal of the citizens of Michigan was still in the circuit court (they not having joined in the petition of removal), a *certiorari*, under the act of Congress of 1875, was directed to be issued to the state court to send it up.

The case was thereupon adjourned for further hearing before Mr. Justice Swayne at Newport, R. I., and was heard on printed briefs.

William Jennison, for proponents:

1. The proceeding known as the "probate of a will," is not included in the cases enumerated in any of the acts of Congress; it is a proceeding *in rem*, belonging peculiarly to the jurisdiction of probate courts and subject to the revisory power of state courts; it was not matter of common law or equity cognizance, but appertained exclusively to the canon of ecclesiastical law. The language of the act of 1875 is: "Any suit of a civil nature at law or equity * * * in which there shall be a controversy between citizens of different states," may be removed, etc.

2. The appeal from the probate court to the state court, and the issues ordered therein, did not constitute a suit *inter partes*; the order appealed from was the "probate of the will," and the issue in the appellate court was the same as that in the probate court.

3. If the United States Circuit Court have jurisdiction the petition and bond for removal should have been filed in the court of original jurisdiction, to wit, the probate court; otherwise the United States Court could not, according to the act, "proceed in the same manner as if it had been originally commenced in the United States Court," and which could not be done without setting aside the decree of the probate court. Causes are not removed to the United States courts for review, but for trial.

4. The act of 1875 requires that the suit be between citizens of different states, and contemplates the removal of the entire suit. Part of the defendants were citizens of Michigan, and they did not join in the petition for removal.

Henry M. Duffield, for contestants:

1. Under the statutes of Michigan the proceeding in the probate court is not such a suit in a state court as the removal acts contemplate; proceedings in that court upon probate of a will are initiatory only; they are not between parties; it is the duty of the court when a will is delivered to it to appoint a time and place of hearing; the proceedings may be promoted by those having no pecuniary interest or by persons upon whom the law, on account of circumstances, shall have cast the duty. No petition for a probate is necessary; no proponents need ask to set the court in motion; it is the duty of the court to *sua marte*; a proceeding may go to a hearing and determination in the probate court without the presence of any of the parties before the court, either proponents or contestants, but upon appeal under the statute giving the right of appeal to any person aggrieved, the case becomes one *inter partes*. The only parties are the proponents and contestants; creditors are not interested; the proponents have no right to charge the expenses of maintaining the will against the general estate. The issue in the circuit court is upon the allegations of the proponents and the denial of the contestants; the question involved is the validity of the will, and the case falls fairly

within the language of Mr. Justice Field, in *Gaines v. Fuentes*, 92 U. S. 10, 3 Cent. L. J. 371. "But whenever a controversy in a suit between such parties, *i. e.*, citizens of different states, arises respecting the validity or construction of a will, there is no more reason why the federal court should not take jurisdiction of the case than there is that it should not take jurisdiction of any other controversy between the parties."

2. The non-resident contestants took their separate appeal from the order of the Probate Court. The second sub-division of section 539, United States Revised Statutes, is not repealed by the act of March 3, 1875. *New Jersey Zinc Co. v. Trotter*, 17 Am. Law Reg. 376. Under this act their appeal may be removed upon the petition of the contestants who are not citizens of Michigan, and there can be a final determination of the controversy, so far as concerns them, without the presence of the other contestants.

3. The objection that the petition was filed too late has been waived by the proponents asking and obtaining a writ of *certiorari* to the state court and causing it to be served. This objection as to the time of filing a petition has been repeatedly held to have been waived by taking testimony or taking any steps in the cause after its removal, and in *Jones v. Andrews*, 10 Wall. 327, by a motion to dismiss the bill for want of jurisdiction in the court, and also want of equity in the bill.

MR. JUSTICE SWAYNE:

The case was fully and ably argued before me upon both sides. I have examined it with care, and my conclusions are as follows:

1. Aside from other objections, the application for the removal of the case to the federal court was made too late. It should have been made before the decree of the probate court was entered, and the appeal taken to the higher state court. Thereafter, the right of removal was at an end; the delay was fatal. Such an application can not be made to an appellate court. *Stevenson v. Williams*, 19 Wall. 572; *Vannevar v. Bryant*, 21 Id. 41; *Lowe v. Williams*, 94 U. S. 650.

There was no waiver of this objection by the proponents. The order for the issue of a writ of *certiorari* to bring up the full record was made by the federal court *sua sponte*. The proponents were no wise actors touching its issue.

2. The proponents are all citizens of Michigan. There were six contestants in the probate court. Four of them were citizens of Michigan, and two of other states. All of them appealed to the state circuit court. The four who were citizens united in one appeal, and the two not citizens in another. The latter only petitioned that court for the removal of the case, and gave the requisite bond. The only question presented in the appellate court was as to the mental capacity of the testator, and the validity of the will. The court directed the same issue to be made upon each appeal as if they were separate cases. Upon an application to the supreme court of the state for a *mandamus* to vacate an order of consolidation made by the state circuit court, it was held that the two appeals constituted inherently and necessarily but one case, and must

necessarily be tried together, and that hence no order of consolidation was needed. This was obviously correct. The case, as presented, was a unit and indivisible. The question to be tried was a single one, and affected alike all concerned, by whomsoever raised. The result must necessarily be final and dispose of the entire controversy. *Lingan v. Henderson*, 1 Bland, Ch. 236.

If the removal was well made, the anomaly will follow that each court may try the validity of the will at the same time independently of the other, in the absence of indispensable parties, and opposite results may be reached. In one court, the will may be held valid, and invalid in the other, and for this state of things there can be no remedy. For the purposes of this case it may be conceded that the 12th section of the act of 1789, and the acts of 1866 and 1867, re-enacted in the Revised Statutes of the United States, section 639, clauses 1, 2, 3, are not repealed by the act of 1875.

(a) The case was not removable under the section first named, because it was always held under that provision that all the plaintiffs must be citizens of the state where the suit is brought, and all the defendants citizens of other states. *Dillon on Removal*, pp. 17 and 18.

(b) Nor under the act of 1866, because it is not a suit brought "for the purpose of restraining or enjoining" the contestants. Nor can there be "a final determination of the controversy so far as concerns" them, "without the presence of other defendants in the cause." *Shields v. Barrows*, 17 How. 130.

(c) Nor under the act of 1867, commonly known as the "Prejudice and Local Influence Act," because the removal was not applied for upon either of those grounds, and neither was alleged by the petitioners.

(d) The act of 1875: This act contains two clauses proper to be considered. It declares, (1) that "any suit" * * * "in which there shall be a controversy between citizens of different states," etc., "either party may remove said suit into the Circuit Court of the United States." Further: (2) "And when in any suit," etc., there shall be a controversy which is wholly between citizens of different states, and which can be fully decided as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States," etc.

Viewing the first of these extracts in the light of the past adjudications, and in the absence of any expression from the Supreme Court, I feel constrained (whatever might be my judgment under other circumstances,) to hold that the term "party" is collective, and means all the plaintiffs and all the defendants, and that all on each side must be "citizens of different states" from those on the other side. See *Dillon on Removal*, pp. 29, 30. This latter construction of the phrase "party" derives support from the second paragraph quoted.

In regard to that paragraph it is sufficient to say that this "controversy" is not "wholly between citizens of different states," and can not be "fully determined as between" the parties before the

court. There are other contestants whose presence is indispensable. They are not, and it is believed can not be, present as parties in this litigation in the Federal tribunal.

3. A Federal court has no jurisdiction in cases of proceedings to establish a will. In *Gaines v. Feuntes*, 92 U. S. 10, 3 Cent. L. J. 371, the Supreme Court said: "There are, it is true, in several of the decisions of this court, expressions of opinion that Federal courts have no probate jurisdiction, referring particularly to the establishment of wills, and such is undoubtedly the case under the existing legislation of Congress."

By this ruling I am bound, and it is conclusive of the case. See, also, *Broderick's will*, 21 Wall. 504; *Du Vivier v. Hopkins*, 116 Mass. 125; *Yonley v. Lavender*, 21 Wall. 276; *Tarver v. Tarver*, 9 Pet. 174; *Fouvergne v. City of New Orleans*, 18 How. 470; 22 How 473, 478. Whether the proceeding here in question is a "suit" within the meaning of the several removal acts, is a question not necessary to be considered.

BILLS OF EXCEPTIONS.

The note referred to in the following correspondence was prepared by one of our contributing editors. When the letters were received he was in Minnesota fighting mosquitoes many happy miles from a law book. He has returned home, and we submit the letters with his replies:

I.

To the Editor of the Central Law Journal:

The opinion in the case of *Jefferson City, etc., v. Opel*, Supreme Court of Missouri, annotated in 7 Cent. L. J., No. 3, p. 46, in refusing to recognize skeleton bills of exception, seems to discredit the following passage in the rules of the supreme court. Vol. 64, Mo. Reports. Rule 13. * * * "No clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions." The opinion holds that a mere call for the motion is insufficient, and that the motion itself must be incorporated bodily in the bill.

Glendower—"I can call spirits from the vasty deep."

Hotspur—"Why, so can I; or so can any man, But will they come when you do call for them?"

Hannibal, Mo., Aug. 3, 1878.

T. H. B.

We do not see that the decision referred to by T. H. B. discredits any rule of the supreme court. The copying of motions and affidavits into a transcript is specially called for when they are incorporated in a bill of exceptions and made a part of the record; until that has been done the copying of them is wholly uncalled for. We can assure T. H. B. that, when so called, they will come.

II.

To the Editor of the Central Law Journal:

In the issue of your journal of July 19, 1878, you published the opinion of the supreme court in the case of *City of Jefferson*, to use P. R. R., v. Opel. In your comments on the opinion you say: "The rule an

nounced in the foregoing case seems to us to be the better and safer one," etc.—that is, if I understand you, that, in making out a bill of exceptions, the motion for a new trial must be copied *at length* in the bill before it is signed by the judge, and so with every other motion, and paper, etc., made a part of the bill of exceptions, and that a memorandum for the clerk, as "here insert," is not sufficient. In other words, there is no such thing known to the law as a "skeleton bill of exceptions." If I am correct in my conclusions as to your views as expressed in the note to the aforesaid opinion, will you be kind enough to give me your construction of section 7, p. 419, and section 10, p. 420, Wagner's Statutes (Mo.), entitled Courts of Record? What is it the clerk is to write, or cause to be written out *at full length*, in the bill of exceptions?

J. R. EDWARDS.

City of Jefferson, Mo., Aug. 9, 1878.

It is very evident that Mr. Edwards did not understand us. We nowhere intimated in the note that "there is no such thing known to the law as a skeleton bill of exceptions." On the contrary, the note was principally devoted to showing that in the Supreme Court of the United States, and in the courts of many of the states, a skeleton bill was recognized as valid. We expressed the opinion that the rule announced by the Supreme Court of Missouri was the better and safer one. We are still of that opinion. An examination of the adjudged cases will, or ought to, convince any one that any other course is uncertain and unsafe. The courts of most of the states recognize skeleton bills as valid, but none of them, so far as we know, sustain so fleshless a skeleton as was preserved in the case to which Mr. Edwards refers. Indeed, we do not know that the supreme court of this state has ever held that a skeleton bill was necessarily invalid. When the court says that "nothing but a bill of exceptions can make motions a part of the record, and unless *incorporated bodily* in the bill, they can not be noticed by this court," we do not understand the court to require the motion to be "copied at length in the bill." Incorporated does not mean copied. As we understand the force of the English language, a motion may properly be said to be incorporated *bodily* in a bill of exceptions when it is united with and made a part of it.

The rule sustained by the weight of authority is well stated in the syllabus prefixed to the case of *A. & N. R. Co. v. Wagner*, 19 Kas. 335: "While what is familiarly known as a skeleton bill—that is, a bill which provides for the subsequent copying by the clerk into it, and as a part of it, some paper or document—is allowed, yet to make such a bill valid and complete, these rules must be regarded: 1st. The bill, in referring to such paper or document, must purport to incorporate it into and make it a part of the bill; a mere reference to it, although such as to identify it beyond doubt, or a statement that it was in evidence, is not sufficient. 2d. The document must itself, at the time of the signature of the bill, be in existence, written out and complete. 3d. It must be annexed to the bill, and referred to as annexed, or it must be so marked by letter, number, or other means of identification mentioned in the bill, as to leave no doubt when found in the record that it is the one referred to in the bill; and these means of identification must be

obvious to all, so that any one examining the record can know what document is to be inserted, or after insertion that the clerk has made no mistake." Measured by these rules, Mr. Edwards will see that his bill was quite too much of a skeleton.

The Supreme Court of Missouri requires papers sought to be made a part of a bill of exceptions to be incorporated in it *bodily*; the Supreme Court of Kansas, and the courts of a majority of the states, permit them to be incorporated by such reference and identification as to exclude *all* doubt of their identity. The trouble with the rule which allows a paper to be made a part of a bill by reference is that it is necessarily uncertain. What is such reference and identification as will exclude all doubt has given rise to a great deal of trouble; the requirements of some of the courts are much more stringent than those of others. The Missouri rule is simple and incapable of leading to confusion.

We are referred to two sections of the statutes of this state which are supposed to be in conflict with the decisions under consideration. It is very clear to us that they are not. Just what application section seven has to the question in controversy, we are unable to see. It simply requires the clerk to attach together the pleadings and other papers *forming the record*, within thirty days after the expiration of the term at which final judgment was rendered. This constitutes the judgment roll. Papers of themselves, forming a part of the record, have no place in a bill of exceptions.

Section ten is as follows: "When any bill of exceptions shall have been allowed and signed, the clerk of the court shall, within the same period, cause the same to be written out at full length, unless previously done, and attach such bill of exceptions to the roll as part thereof." As we understand this section, it fully sustains the position taken by the Supreme Court of Missouri. If any paper made a part of the bill has not been copied into the bill at length, but has been incorporated in it by attaching it to the bill, with proper references, then it becomes the duty of the clerk to copy such paper into the bill. The clerk is directed to copy the bill; he is not directed to copy a paper not a part of *the bill*, although referred to therein.

M. A. L.

SELECTIONS.

ACTIONS FOR HARBORING A WIFE.—A very unusual case came before the Preston Sheriffs' Court last week. A farm laborer sued a farmer to recover damages for the loss he had sustained through the defendant harboring his (complainant's) wife, who was defendant's sister. Evidence was given for the defense that the plaintiff had grossly abused his wife, that he had been three times summoned for assaults upon her, that he had been bound over for threatening to shoot her, and that the defendant was only offering brotherly protection; and the jury returned a verdict for one farthing damages. Judgment is stated to have been allowed to go by default to save expenses, but it is clear that if the facts alleged for the defense were satisfactorily proved no action could have been maintained; for, as Lord Kenyon pointed out in *Philip v. Squire*, 1 Peak, 114, if, where the wife is received from motives of hu-

manity, the action could be supported, the most dangerous consequences would ensue, for no one would venture to protect a married woman. And it appears to be sufficient to prove that the wife represented that she was ill-treated by her husband; it is of no consequence whether her representation was true or false. In a subsequent case of *Berthon v. Cartwright*, 2 Esp. 480, the same learned judge ruled, that if a husband ill-treats his wife so that she is forced to leave his house through fear of bodily injury, "a person may safely, nay honorably, receive and protect her."—[*Solicitors' Journal*.]

CONCERNING COSTS.—A story is told by a friend of Campbell the poet, that when visiting at the house of the family, he and Thomas, then about thirteen, were speaking of getting new clothes, and descanting in great earnest upon the most fashionable colors. Tom was partial to green, the other preferred blue. "Lads," said Campbell's father, in a voice that fixed their attention, "if you wish to have a lasting suit get one like mine." They thought he meant one of a snuff-brown color, but he added, "I have a suit in the court of chancery, which has lasted thirty years, and I think it will never wear out." Playing upon the same subject, of the traditional length and consequent expensiveness of chancery cases, Swift, in the person of Gulliver, informed the King of Brobdingnag about his father having been ruined by a suit in chancery, in which after twenty years' litigation, he had obtained a decree in his favor *with costs*. Now-a-days these anecdotes only remind one of what has been. Suits in chancery are now disposed of as expeditiously as actions at law, and if, in any instance, they seem to be longer, it is usually because these suits are many-sided, involve various issues between the different parties, and contain sufficient material to form the staple of half-a-dozen ordinary common law actions. However, costs are always a subject of much interest both to the suitor and his professional adviser. Mr. Jacob's happy thought about the pertinacity of counsel has been embalmed in one of the judgments of James, L. J. "I was informed," he says, "forty years ago, by the late Mr. Izech, that questions in this court, with respect to the importance attached to them, and the zeal with which they were argued, are in the following ratio:—Practice, first; costs, second; and merits, third and last;" Attorney-General v. Earl of Lonsdale, 19 W. R. 235—[*Canada Law Journal*.]

NOTES OF RECENT DECISIONS.

REMOVAL OF CAUSES.—*Taylor v. Rockefeller*. United States Circuit Court, Western District of Pennsylvania, 35 Leg. Int. 284. Opinion by Mr. Justice STRONG. 1. In an application for removal of a cause from a state to a federal court, the petition and bond must be filed "before or at the term at which the cause could first be tried and before the trial thereof." 2. It is the federal court and not the state court that has the power to adjudge whether the case is a proper one for removal under the act of Congress. 3. Under the act of 1875, although some of the formal or nominal plaintiffs and defendants may be citizens of the same state, still if it is shown that it is a controversy wholly between citizens of different states, and can be fully determined *as between them*, then it is a cause that can be removed to the federal court.

SEDUCTION—LOSS OF SERVICE—PAROL CONTRACT.—*Mohry v. Hoffman*. Supreme Court of Pennsylvania, 6 W. N. 49. PER CURIAM. A verbally agreed with B that his daughter should live in B's family as servant, until her arrival at eighteen on years of age,

when B was to give her an outfit, and in the meanwhile was to provide the girl with board, clothing and schooling, and, at a proper time, send her to the minister for confirmation; A reserved the right to call his daughter home, in case of sickness, to help the family. The girl, while in B's service, was seduced by C, his son. *Held* (affirming the judgment of the court below), that this parol contract did not transfer the father's right to service beyond recall, and that hence an action for seduction *per quod servitium amisit* could be brought by A against C.

TRUST ESTATE—POWER OF CESTUI QUE TRUST TO ALIEN—PURCHASER—TITLE.—*Read v. Power*. Supreme Court of Rhode Island, 17 Am. L. R. 561. Opinion by POTTER, J. Where the *cestui que trust* of real estate has an absolute interest without any control in the trustee, the former may, as a general rule, alien his estate. Where the *cestui* has been in possession a long time, the court may direct the jury to presume a conveyance from the trustee to perfect the title, or may itself act upon the same presumption. But where the legal title is in a trustee, though only for a naked trust to convey, a purchaser from the *cestui que trust* will not, in the absence of an express agreement to accept the equitable title only, be compelled, on a bill for specific performance to accept the title from the *cestui* unless it is perfected by a conveyance of the legal estate from the trustee.

CONVERSION—HORSE HIRED TO GO TO G. BUT DRIVEN FARTHER—LOSS—ACTION—INFANCY—PROMISSORY NOTE.—*Ray v. Tubbs*. Supreme Court of Vermont, 6 Rep. 318. Opinion by ROYCE, J. Defendant, an infant, hired a horse of plaintiff, agreeing not to drive it beyond G, but soon brought it back saying it was sick, and exchanged it for another, which he intended to drive to S, a place beyond G, but he said nothing to plaintiff about it, and plaintiff understood that he was not to drive it beyond G. Defendant drove it beyond G, and so overdrove it that it died. *Held*, that defendant took the second horse subject to the conditions as to the distance to which he should drive it under which he took the first one, and that by driving it beyond G he rendered himself liable in tort for the damage resulting therefrom. In satisfaction for the damage so resulting, defendant, being still under age, gave plaintiff his promissory note, upon which, after defendant became of age, plaintiff brought assumpsit, to which defendant alleged his infancy. *Held*, that defendant was liable upon the note to the same extent that he would have been in an action on the cause that formed its consideration, and that his infancy was no defense.

PRINCIPAL AND AGENT—RIGHTS AND DUTIES OF BROKERS—WHEN NON-DISCLOSURE OF PRINCIPAL DOES NOT RELIEVE FROM LIABILITY—DELIVERY OF BONDS—WHAT NECESSARY TO CONSTITUTE.—*Maitland v. Martin*. Supreme Court of Pennsylvania, 6 W. N. 52. Opinion by MERCUR, J. In 1873, B, a broker, purchased for A, and at her request, five South Carolina bonds of \$1,000 each. A permitted the bonds to remain in B's possession until 1875, when she directed him to sell them at a certain price. B effected the sale through his New York correspondent, C, and received the latter's draft for the net proceeds of all five bonds. Before A called for the money, C notified B that three of the bonds, received by him for his New York purchaser, had been found to belong to a number of bonds repudiated by the legislature of South Carolina in 1874, and by ruling of the New York Stock Board made "no delivery." B, at his own expense, replaced the three non-fundable bonds with others, and received back the former, and offered to deliver them to A and account with her for the proceeds of the two valid bonds. This A declined

to do, and brought suit against B for the whole amount originally received by him from C. *Held*, that A could not recover, and must bear the loss, the bonds having depreciated while owned by her; and B having acted strictly in the line of his duty as agent in perfecting the sale and incurring the damage. *Held*, further, that the non-disclosure of A by B to C or his purchaser did not place the sole liability upon B. It required a delivery or readiness to deliver the bonds of the kind sold, according to the contract to complete the transaction between the two agents * * In fully perfecting a sale, B was strictly within the line of his duty.

SUIT AGAINST STATE—APPEARANCE BY ATTORNEY-GENERAL—RES ADJUDICATA.—*Adams v. Bradley*. United States Circuit Court, District of Nevada, 2 Pac. Coast L. J. 9. Opinion by SAWYER, J. 1. A state can not be sued in its courts without its consent. 2. The appearance of the district-attorney or the attorney general of the state, on behalf of the state, without express authority of law, does not give jurisdiction over the state as defendant in the action. 3. Section 2778 compiled laws of Nevada does not authorize the attorney general to so appear for the state generally in an action against its officers in their individual capacity, as to make it a party to the action, and conclude it by the judgment. 4. Treadway sued Slingerland, in his individual capacity, to recover possession of lands upon which the Nevada State Prison is situated. Slingerland, who was at the time lieutenant-governor of the state and *ex officio* warden of the state prison, set up as a defense title in the state, and that he was in possession under the state as warden of the state prison and not otherwise. O. H. Clarke, who was then attorney-general of the state, appeared as attorney for the defendant without using his official designation in the signature to the pleadings. Treadway recovered judgment. In a subsequent action by the successors in interest of Treadway against the governor, warden—the successor in office to Slingerland—and other officers of the state, to recover the same land: *Held*, that the judgment in said case of Treadway v. Slingerland did not conclude the state or affect its title.

INSURANCE—ULTRA VIRES—MUTUAL COMPANIES—RIGHT TO ISSUE POLICIES UPON "ALL CASH PLAN"—STOCK POLICIES AND MUTUAL CASH POLICIES DISTINGUISHED.—*Schimpf v. Lehigh Valley Mut. Ins. Co.* Supreme Court of Pennsylvania, 6 W. N. 23. Opinion by PAXSON, J. 1. It is not *ultra vires* for a mutual insurance company to issue policies upon the "all cash plan" free from assessment and liability, and to pay for losses upon such policies by assessments levied upon those holding policies paid for by premium notes and assessments thereon. 2. The directors of the company have power to levy such an assessment after a general assignment by the company for the benefit of creditors. 3. An insurance company by its charter was limited to a strictly mutual business. It issued two classes of policies, the first paid for by an all cash premium, and not subject to assessment, the second, partly by cash, and partly by an assessable premium note. S insured with the company upon the latter plan, paying ten per cent. cash and giving a premium note for the balance. The company executed an assignment for the benefit of its creditors, and soon after its directors levied an assessment upon S for the payment of losses, of which \$30,000 were on cash policies, and on premium-note policies \$7,000. In an action by the company against S to recover the amount of his assessment: *Held*, that the company was empowered under its charter to issue cash policies, as the cash premium represented the insured in the common fund, as well as the premium note. 4.

The directors had power to levy an assessment upon premium notes, after an assignment for the benefit of creditors. 5. Mutual cash policies distinguished from stock policies.

MARRIED WOMEN—STATUTE—CONTRACTS BETWEEN HUSBAND AND WIFE.—*Jenne v. Marble*. Supreme Court of Michigan, 6 Rep. 316. Opinion by CAMPBELL, J. Under the statutes of Michigan in relation to married woman, husband and wife can not contract with each other in any larger sense than they could formally in equity. Their contracts when valid may be enforced at law. This was an action of assumpsit, by the assignee of a husband against his wife, on personal covenants for the payment of rent embraced in a lease from the husband to the wife, and also for the value of certain farm live stock claimed to have been sold to her. The court below held the transaction invalid, and plaintiff appealed. Under the statutes of Michigan, a wife has no power to contract except in regard to her separate property. The present contract, if valid, is made so because the leasehold interest for which she bargained could be so regarded, and also the personal property which it is claimed she purchased. This case is without any clear precedent, and must depend upon whether it is covered by principles which have been determined. It has been held that a contract for the purchase of property may be lawfully made by a married woman, the procurement of property which she is to own being equivalent to the creation of a separate interest. *Tillman v. Shackleton*, 15 Mich. 447; *Campbell v. White*, 22 Ib. 178; *Powers v. Russell*, 26 Ib. 179; *Rankin v. West*, 25 Ib. 196. The constitution and statutes are clear against her right to make a mere personal obligation unconnected with property, and not charging it; so that she can not become personally bound jointly with her husband, nor as a surety, by mere personal promise, *De Vries v. Conklin*, 22 Mich. 255; *West v. Laraway*, 28 Ib. 464; *Emery v. Lord*, 26 Ib. 431. She may receive a gift of land directly from her husband as the statutes now stand: *Burdeno v. Amperse*, 14 Mich. 94; but she could not do so until the statute of 1855 gave her large powers of contracting. *Ransom v. Ransom*, 30 Mich. 328. She may also make gifts and transfers to her husband. *Penniman v. Perce*, 9 Mich. 509; *Durfee v. McClurg*, 6 Ib. 223. But the law has not disregarded the fact that marital influence places married persons in different relations from others, and prevents their dealings from being governed by the same rules which usually require others to abide by bargains not tainted with distinct evidence of fraud and misconduct. Where a husband gets the advantage, it requires no great positive evidence to establish the invalidity of his bargain. *Witbeck v. Witbeck*, 25 Mich. 439; *Wales v. Newbould*, 9 Ib. 45; *Stiles v. Stiles*, 14 Ib. 72. The act of 1855 does not abrogate all the common law or of the statutes restraining married women from contracting, and it does not profess to change the powers of husband and wife to deal with each other, except so far as such a change is implied. So far as it fairly extends it does so operate in some important particulars as held by this court heretofore. But we have not held, thus far, that husband and wife may contract with each other generally, nor has it been heretofore decided that they could now make contracts enforceable at law, which could not have been enforced in equity formerly concerning a wife's separate estate. We have found nothing authorizing the inference that a husband could sue a wife at law or in equity to enforce a purely executory contract. The case of *Livingston v. Livingston*, 2 Johns. 537, sustains no such doctrine. The bill in that case, instead of seeking to enforce the contract, treated it as void. In *Milnes v. Busk*, 2 Ves. Jr. 488, it was emphatically denied that husbands and wives could contract as other persons might concerning the wife's

separate estate. We think that husbands and wives can not contract with each other in any larger sense than they could formerly in equity, except that their contracts, when valid, may be enforced at law when legal in form.

ABSTRACT OF DECISIONS OF SUPREME COURT OF ILLINOIS.

[Filed at Springfield, June 24, 1878.]

Hon. JOHN SCHOLFIELD, Chief Justice.

" SIDNEY BREESE,	Associate Justices.
" T. LYLE DICKEY,	
" BENJAMIN R. SHELDON,	
" PICKNEY H. WALKER,	
" JOHN M. SCOTT,	
" ALFRED M. CRAIG,	

PRINCIPAL AND AGENT—AUTHORITY CONFERRED BY ACTS OF THE PRINCIPAL.—The controversy in this case is whether appellee is liable for a bill of cigars and ale shipped by appellant to his address on an order drawn in his name by his son on them to that effect. The son received the goods and made use of them himself without the knowledge of appellee. Appellee denies that his son had authority to purchase for him. Several witnesses testify that, at the time when the goods were ordered, and prior and subsequent thereto, the son was employed in the grocery store of defendant, buying and selling and acting as general agent. The court below gave judgment for defendant, and plaintiff appeals. SCHOLFIELD, C. J., says: "We do not think it important to inquire precisely what authority appellee in fact conferred upon his son, in regard to his business, because, in our opinion, the decided preponderance of the evidence is that he was suffered to act as a general agent, both in buying and selling, and the public were therefore justified in assuming that he possessed all the powers requisite to a general agent in buying and selling. It is true, as contended by counsel for appellee, that an authority to buy can not be inferred simply from an authority to sell, yet where a clerk or shopman has been accustomed to buy as well as to sell, the presumption of full authority is equally applicable to both. Story on Agency, § 89. By permitting another to hold himself out to the world as his agent the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent." Reversed.—*Thurber v. Anderson*.

EXEMPTION FROM EXECUTION—PERSONAL PROPERTY—PURCHASE-MONEY.—This was a suit in replevin for household goods. Judgment was given for defendant, and plaintiff appeals. The cause was tried below on an agreed state of facts, of which the following is a part: "It is further agreed that the property levied upon is exempt from execution, unless the fact of the debt being for the purchase-money renders the property liable to this execution." SHELDON, J., who delivered the opinion, says: "The sole question presented is whether, by virtue of the act in force July 1, 1873, Rev. Stat. 1874, p. 497, personal property which would otherwise be exempt is liable to be taken under an execution issued upon a judgment obtained on a debt incurred for the purchase of the property. The question arises under section 3 of the act as follows: 'But no property shall, by virtue of this act, be exempt from sale for non-payment of taxes or assessments, or for a debt or liability incurred in the purchase or improvement thereof.' This question was decided in the negative against such liability by

this court at the last term, in the case of Wells v. Silby, where it was held that this section had no application to personal property, but related solely to real property—the homestead. On the authority of that case, seeing no reason to change the conclusion there reached, the judgment will be reversed." Reversed.—*Howard v. Lacon*.

DAMAGES—INSTRUCTION—COMPARATIVE NEGLIGENCE.—This was a suit by an administrator of a deceased child, to recover damages resulting to the next of kin on account of its death. The facts were substantially these: The child was twenty-eight months old. The parents lived near the railroad track. The child wandered out of the house upon the track. The mother, hearing the whistle of the locomotive, ran out after her, and both were killed. The jury found for the plaintiff below, and defendant appeals upon the ground of an erroneous instruction given for the plaintiff. SCOTT, J., says: "The child was too young to exercise any care for her personal safety. But as its parents, in whose custody it was, must be charged with the duty of exercising reasonable care for its safety, and if for want of such care the child was killed, it is apprehended there can be no recovery on behalf of the next of kin. Taking the most favorable view possible for plaintiff, the evidence offered made it a debatable point whether the parents had exercised a reasonable care for their child, being of such tender age as to be wholly dependent upon them, and the jury ought to have been most accurately instructed in relation to the doctrine of comparative negligence of the parties. The fourth instruction given for plaintiff in this branch of the case is faulty. It asserts the proposition that although the parents of this infant killed may have been guilty of slight negligence, yet if defendant was guilty of a 'greater degree of negligence,' plaintiff might recover. This not the law. Where there is negligence on the part of the injured party, or, as in this case, on the part of those charged with the care of that injured party, contributing directly to produce the injury, there can be no recovery unless such negligence is slight, and that of the defendant is gross in comparison in regard to that which caused the injury complained of. It is not sufficient that defendant may have been guilty of a greater degree of negligence in respect to the producing cause of the injury." Reversed.—*Toledo, W. & W. R. R. Co. v. Grable*.

NEGLIGENCE—DAMAGES—UNRULY ANIMAL.—This was a suit for damages sustained in the loss of a horse. The facts were these: Plaintiff and defendant were each exhibiting a stallion on the streets of Le Roy. The horse of plaintiff began backing, and coming within short range of defendant's horse, the latter kicked and broke the leg of the plaintiff's horse. The horse of defendant remained where he was standing. It does not appear that the horse of defendant was vicious or dangerous, nor does it appear that defendant was guilty of negligence. On the other hand it appeared that plaintiff's horse was vicious, and that plaintiff, who was riding him, did not observe ordinary care. Judgment below was for plaintiff. CRAIG, J., who delivered the opinion, says: "The owner of domestic or other animals, not naturally inclined to commit mischief, as dogs, horses and oxen, is not to be liable for any injury committed by them to the person or personal property, unless it can be shown that he previously had notice of the animal's mischievous propensity, or that the injury was attributable to some other negligence on his part, it being in general necessary in an action for an injury committed by such animals to allege and prove a *scienter*. See 13 Johns. 339; 22 Ill. 140. We understand, too, that the party damaged can not recover if his negligence contributed materially to the injury, as was said in 65 Ill. 235. We are satisfied that the defendant's horse was not vicious or dang-

erous; that he were free from negligence that contributed to the injury, and we perceive no principle upon which he can be held liable." Reversed.—*Mareau v. Vanatta*.

REPLEVIN—CHATTEL MORTGAGE—SALE OF THE PROPERTY BY MORTGAGOR.—This was an action of replevin by appellee against appellant. A recovered a judgment against B, the son of appellee, Feb. 24, 1876, on which execution issued and came into the hands of appellant, sheriff, who levied it Feb. 25, 1876, upon the property in controversy. Appellee replevied it, claiming title to it under a chattel mortgage from B. The only question arising is respecting the chattel mortgage, whether it was fraudulent as against creditors. The chattel mortgage was executed Nov. 10, 1875, to secure the payment of a promissory note, with a provision that the mortgagor might retain the possession and use the property until the time of payment of the note, which, with the mortgage, was given by B to appellee to secure him for a debt which B owed and which appellee guaranteed. Appellee had permitted B to sell a part of the mortgaged property and appropriate the proceeds to the payment of a debt not owing to appellee, and for which the latter was not surety. Appellee had himself shipped a part of the mortgaged property to Chicago and sold it to pay a part of the debt for which he was surety. There was in evidence also at the trial a written consent from appellee to B to sell the mortgaged property at public or private sale. The property was replevied on the day advertised by B for its sale and afterwards sold. Judgment was given for the plaintiff and defendant appealed. The court say that if the mortgage was "in truth and good faith to secure against a contingent liability as surety, the latter would be a good consideration, and although appellee had not in fact paid the debts for which he was security, if he would have them to pay, he might well hold the property." *SHELDON, J.*, further says: "But the point more particularly relied on by the appellant as avoiding the mortgage, was permitting the mortgagor to make sale to the extent which he did. It is contended that this invalidated the mortgage under the decision in the case of *Barnet v. Fergus*, 51 Ill. 352." After discussing this case the court concludes that in the present case the sale by the mortgagor, under the circumstances, of inconsiderable parts of the property, can not be held as rendering the transaction fraudulent, and "we can not look upon them as enough to bring the case within the rule of *Barnet v. Fergus*." Affirmed.—*Goodheart v. Johnson*.

ABSTRACT OF DECISIONS OF SUPREME COURT OF MICHIGAN.

June Term, 1878.

HON. J. V. CAMPBELL, Chief Justice.
 " T. M. COOLEY,
 " ISAAC MARSTON, } Associate Justices.
 " B. F. GRAVES,

DESTROYED NOTE—PAYMENT—BURDEN OF PROOF.—In suit on a promissory note, where the maker testifies he paid and then destroyed it, while the payee insists that it was snatched from him and destroyed without payment, the chief question is whose testimony is most worthy of belief; but if any burden of proof can be said to rest on either party it is upon the debtor, who, admitting that the demand was in force when the creditor entered his place of business, claims that a few minutes afterwards he discharged it. Opinion by COOLEY, J.—*Marvin v. Newman*.

CRIMINAL LAW—WHEN CHALLENGE SUBMITTED—EXAMINATION OF JUROR BY JUDGE—JUROR'S OPINION OF GUILT.—*Held*, 1. That when the defense rests on its examination of a challenged juror, and the judge instead of the prosecuting officer then examines him, the challenge is not submitted, but the defense is entitled to meet by further inquiries the case as it stood when the judge concluded. 2. That where a juror states that his opinion or impressions of the prisoner's guilt are of such a character that it would require evidence to remove them, the challenge should be sustained, though he denies that the information received, or the impression formed, are of such a positive character that it would be impossible for him to hear the testimony and decide impartially. Opinion by COOLEY, J.—*Stephens v. People*.

EFFECT OF RECORD OF PLAT—NOTICE—ACKNOWLEDGMENT—ALTERATION OF REGISTRY.—Where a party who only owned an undivided part of a certain outlet executed and had recorded a plat thereof, whereon he described himself as owning the whole, which plat was subsequently acknowledged by his wife who was the real owner of the three-fourths: *Held*, on ejectment by grantees of the wife: 1. That the record of the plat could not operate to place title in the husband. Its only object was to show the platting and dedication, and it was not valid, nor was it notice for anything else. A record is not notice when not made so by statute. *Columbia Bank v. Jacobs*, 10 Mich. 349; *Brown v. Cady*, 11 Mich. 535; *Brown v. McCormick*, 28 Mich. 215. 2. That a subsequent acknowledgment can only be added to the original record by entering it as a further record as of the date of its actual registry. An original record can not be made prospective so as to include the subsequent record of matters not upon the paper when first recorded. Opinion by CAMPBELL, C. J.—*Burton v. Martz*.

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1878.

HON. ALBERT H. HORTON, Chief Justice.
 " D. M. VALENTINE, } Associate Justices.
 " D. J. BREWER,

COSTS—MISDEMEANORS.—In a certain case of assault and battery, wherein the state of Kansas was plaintiff, the defendant was, in a justice's court, convicted and sentenced to pay a fine and the costs; but, on appeal, and in the district court, the defendant was acquitted and discharged, and the court then assessed the costs of the case against the prosecuting witness, on the ground "that the defendant had been tried, acquitted and discharged." *Held*, that this was error. The following sections of the statutes were examined and held not to authorize the said ruling of the district court, to wit: Section 326 of the Code of Criminal Procedure (Gen. Stat. 872); Section 18 of the act relating to jurisdiction and procedure before justices of the peace in cases of misdemeanor (Gen. Stat. 881); and Section 18 of the act fixing the fees of certain officers and persons (Gen. Stat. 481). Opinion by VALENTINE, J. Reversed. All the justices concurring.—*State v. Reisner*.

RAILROADS—STOCK LAW OF 1874.—1. Plaintiff's mare got on to the defendant's track at a place where it ought to have been but was not fenced. Frightened by an approaching train, she fled along the track until she reached a tie bridge. Here she either jumped

forward or was thrown forward by the engine on to the bridge, and her legs falling between the ties she was fatally injured. *Held*, that the company was liable, under chapter 94 of the laws of 1874. 2. Under that statute no actual collision between the engine and the animal injured is essential to liability; it is enough if the injury occurs in the operating of the railroad and as a direct result therefrom. 3. The proviso in the 5th section of the act implies not merely the lack of a fence, but also the lack of one where no superior obligation forbids a fence, and also the lack of one which might have prevented the injury. Opinion by BREWER, J. Affirmed. All the justices concurring. —*A. T. & S. F. R. R. Co. v. Jones*.

AMENDMENTS—WITNESS—EVIDENCE—INSANITY. —1. In an action brought upon a promissory note to recover of one of the parties the amount due, and the bill of particulars filed before the justice in the case contains a copy of the note, the statement that the defendant placed his name on the back thereof before delivery and at the time it was made, and then with the maker delivered it to the payee, and, also, sets forth that such person is an endorser of the note, that demand has been made of the maker, and notice of protest has been given, and on appeal to the district court the plaintiff, against the objection of the defendant, files an amended bill of particulars or petition, alleging the defendant is liable upon the note as a guarantor: *Held*, not error, as such amendment only makes the cause of action of plaintiff definite and certain, and frees it from all the contradictions of the original bill of particulars. 2. A person who has at some time, prior to the trial at which he is called upon to testify, been declared insane and placed under guardianship, and thereafter, and before being introduced as a witness, has been duly adjudged sane and released from guardianship, is a competent witness in court. Such witness, after his restoration to sanity, may testify respecting facts which occurred during the period he was under guardianship; and it is for the jury to judge of the credit that is to be given to his testimony. Opinion by HORTON, C. J. Affirmed. All the justices concurring. —*Sarbach v. Jones*.

ABSTRACT OF DECISIONS OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

March Term, 1878.

HON. HORACE GRAY, Chief Justice.	
" JAMES D. COLT,	Associate Justices.
" SETH AMES,	
" MARCUS MORTON,	
" WILLIAM C. ENDICOTT,	
" OTIS P. LORD,	
" AUGUSTUS L. SOULE,	

ASSIGNMENT FOR BENEFIT OF CREDITORS. — Assignments in trust for the benefit of creditors, the only consideration for which is the acceptance of the trust are of no effect against creditors who do not assent to them, and who, by trustee process or otherwise, attach the property described in the instrument of assignment. *Russell v. Woodward*, 10 Pick. 408; *Viall v. Bliss*, 9 Pick. 13; *Fall River Iron Works Co. v. Croade*, 15 Pick. 11; *Edwards v. Mitchell*, 1 Gray, 239. Opinion by SOULE, J. —*Swan v. Crafts*.

RAILROAD CORPORATION—STATUTE—CONSTRUCTION. —The statute of 1874, ch. 372, § 141, providing that "no railroad corporation shall charge or receive

for the transportation of freight to any station on its road a greater sum than is at the time charged or received for the transportation of the like class and quantity of freight from the same original point of departure to a station at a greater distance on its road in the same direction," applies only to the transportation of freight by the defendant railroad corporation as a common carrier over its own road, and not to the transportation over other railroads, for which the defendant charges nothing, and receives nothing, except as collecting agent of the corporations owning those roads. Opinion by GRAY, C. J. —*Com. v. Worcester & Nashua R. R.*

MUNICIPAL CORPORATION—CONTRACT. —The vote of a municipal corporation which looks to the payment of money to a person may or may not be a contract, which may be enforced in law. If the subject of the vote be an original proposition contemplating acceptance and action on the part of another, such acceptance and action may complete the contract so that an action can be maintained upon it. If the vote be not an original proposition, but relates to a matter of negotiation or difference between the municipality and another, and is in the nature of a tender of compromise, then it may become a contract by acceptance by the other party before it is revoked. Ordinarily votes of cities or towns are not contracts. Opinion by LORD, J. —*Paine v. Boston*.

PROMISSORY NOTE—INDORSER—ORIGINAL PROMISOR. —Under the rule adopted in this state, that a person, other than the payee of a negotiable promissory note, who writes his name on the back thereof at its inception and before delivery, is liable as an original promisor, a president of a corporation who indorses a note given by its treasurer for money loaned is so liable to a plaintiff who, at the time he took the note, had no knowledge of any restriction in the by-laws of the corporation upon the power of the treasurer to give the note of the corporation; or that the president only put his name thereon as president of the company in approval of the treasurer's act in giving it, and not with the intention of adding his private responsibility to the security of the note. See *Essex Co. v. Edmonds*, 12 Gray, 273; *Wright v. Moore*, 9 Gray, 338. Opinion by COLT, J. —*Gilson v. Stevens Machine Co.*

CONVEYANCE SUBJECT TO MORTGAGE—ASSUMPSIT. —1. Where land is conveyed on terms subject to a mortgage, the grantee does not undertake or become bound by the mere acceptance of the deed to pay the mortgage debt. *Strong v. Converse*, 8 Allen, 557; *Drury v. Tremont Improvement Co.*, 13 Allen, 138. 2. But if a grantee takes a deed containing a stipulation that the land is subject to a mortgage which the grantee assumes or agrees to pay, a duty is imposed on him by the acceptance, and the law implies a promise to perform it, on which promise, in case of failure, *assumpsit* will lie. *Pike v. Brown*, 7 Cush. 133; *Braman v. Dowse*, 12 Cush. 227; *Jewett v. Draper*, 6 Allen, 434; *Furnas v. Durgin*, 119 Mass. 500. 3. In the case at bar, the nominal consideration was \$11,000, and the conveyance was made "subject however to a mortgage * * * of \$7,000, which is part of the above-named consideration." *Held*, that a promise to pay the mortgage debt can not be inferred from the acceptance of the deed, on the ground that the clause contains this reference to the consideration. The words do not necessarily imply any obligation to be performed by the grantee. Opinion by ENDICOTT, J. —*Fiske v. Tolman*.

ABSTRACT OF DECISIONS OF SUPREME COURT OF INDIANA.

May Term, 1878.

HON. WILLIAM E. NIBLACK, Chief Justice.
 " HORACE P. BIDDLE,
 " JAMES L. WORDEN,
 " GEORGE V. HOWK,
 " SAMUEL E. PERKINS, } Associate Justices.

NUISANCE—LIABILITY OF COUNTY COMMISSIONERS FOR.—Municipal corporations are liable for certain torts, including nuisances, the same as natural persons. Where, however, the act complained of is *ultra vires*, no such liability exists. It is only where there has been some abuse of authority conferred on the corporation that an action can be sustained. A pest-house where small-pox patients are kept, may constitute such a nuisance as a board of county commissioners will be liable for maintaining. Opinion by NIBLACK, C. J.—*Haag v. Board of County Commissioners of Vanderburg Co.*

PROMISSORY NOTE—ALTERATION—CONSENT OF MAKER.—A material alteration of a note, made without the consent of the party to the note, will render the note void as to him. But where a note provided for the payment of six per cent. interest and was secured by mortgage on the maker's land, and in consideration that the holder of the note would release the mortgage, the words "ten per cent. interest after maturity" were inserted in the note, with the consent of the maker: *Held*, this was not such an alteration as the maker of said note could take advantage of. Opinion by PERKINS, J.—*Nelson v. White.*

RULE IN SHELLEY'S CASE—CONSTRUCTION OF WILL.—Suit for partition of real estate of which Richard F. Lytle died seized. The case turns upon the construction of certain clauses in the will of the testator, which are as follows: "I do hereby bequeath and devise to Nathan L. Lytle and Richard F. Lytle, Jr., the undivided and equal one-fifth," etc. (describing the lands), "to have and to hold the same for the sole use, behoof and benefit of my daughter, Sarah Elizabeth Potter, and to her heirs begotten of her body; and I further direct that the said trustees do pay over to the said Sarah, or to her heirs, begotten as aforesaid, the full rents and profits thereof annually, for her or their exclusive support and maintenance, and to be receipted for by the said Sarah if living. I do further direct that in case the said Sarah should die without leaving any children, or their descendants, that then, and in such case, the land devised to her shall be the absolute property of the said Nathan L. Lytle, Richard F. Lytle, Jr., Malinda E. Lytle, Mary A. Lytle and James S. Lytle, their heirs and assigns forever." At the death of the testator, said Sarah Elizabeth Potter had three children living who were still living when suit began. The suit was brought by the trustee of these children against certain persons, to whom Sarah Elizabeth Potter had conveyed the lands. PERKINS, J. (abstract of opinion). In the devise to the Lytles, trustees, the words "their heirs" are not used. Hence, if said trustees took the legal title, it was because it was necessary to the execution of the trust. 35 Ind. 474. The trust in this case imposes upon the trustee the duty of paying the rents to the beneficiaries and taking the receipt therefor of one of them. It is well established that a devise to trustees to hold real property for the sole use and benefit of a named beneficiary for and during the life of such beneficiary and to pay him the rents annually, taking his receipt therefor, is such a power of management as vests the legal

estate in the trustees. 60 Penn. 492. It sufficiently appears that Sarah Elizabeth was not possessed of the legal title, and had no power to convey it.—*Locke v. Barbour.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

January Term, 1878.

HON. E. G. RYAN, Chief Justice.
 " ORSAMUS COLE,
 " WM. P. LYON,
 " DAVID TAYLOR,
 " HARLOW S. ORTON, } Associate Justices.

LEASE—STATUTE AS TO SALES OF PERSONALTY.—1. Whether a contract purporting to be for the lease of a chattel for nine months, with a provision that if, at the end of that time, the lessee should pay an additional sum, the lessor will sell the chattel to him for that sum, is not such a conditional sale as to be within the provisions of ch. 113 of 1872—"An act to prevent frauds in the sale of personal property," *quære*. 2. Said chapter 113 must be construed as designed to protect creditors of the vendee, or persons claiming title to or interest in the property from him by sale, assignment or otherwise, where the contract is not filed (14 Wis. 222); and it does not protect mere trespassers. 3. Where, therefore, in an action by the lessor or conditional vendor against a third person, it appeared that, after a default by the lessee, entitling plaintiff, as against him, to possession of the property, defendant, being then in possession, refused to surrender on plaintiff's demand, and there was no evidence that he claimed under a sale or assignment from the lessee, or was other than a mere trespasser, it was not error to direct a verdict for the plaintiff. 4. Where defendant, upon demand made upon him for the specific property, refused to surrender it, without then denying the fact of his possession, this may be regarded as an admission by him that he was in possession, and, in the absence of any contrary evidence at the trial, is sufficient to sustain the action, notwithstanding a general denial in the answer. Opinion by TAYLOR, J.—*Kimball v. Post.*

HABEAS CORPUS—CRIMINAL CONTEMPTS—DECREE OF DIVORCE.—1. Where a petition to this court for a writ of *habeas corpus* shows an illegal imprisonment, the writ will not be denied except for the most weighty considerations, the existence of which must be determined in each case upon its own facts; and, in this case, the petition of a private person showing an illegal imprisonment by order of a circuit court, as for a contempt, this court grants the writ as an exercise of its original jurisdiction. 2. Sec. 23, ch. 149, R. S., relating to proceedings as for contempt, which declares that "when the misconduct complained of consists in the omission to perform some act or duty which is yet in the power of the defendant to perform, he shall be imprisoned only until he shall have performed such act or duty," etc., applies only to cases arising under sec. 21 of the same chapter, which provides a *civil remedy* by indemnity to the injured party; and not to cases of punishment as for a criminal contempt, under other provisions of said chapter. 3. In the punishment of criminal contempts as such, under our statutes, the utmost term of imprisonment in any case is six months and until the costs and expenses are paid. R. S., ch. 149, sec. 25. 4. The court cannot in the same order or proceeding, award indemnity for the misconduct, under sec. 21, and punish it as a criminal contempt. [Whether such indemnity may be awarded, and punishment inflicted, for the same act, by distinct proceedings,

not considered.] 5. The "loss or injury" for which indemnity may be required under sec. 21, is a *pecuniary* loss, or an injury for which *damages* might be recovered in an action therefor. 6. Where judgment of divorce awards custody of a child of the parties to the father, and thereafter the mother abducts the child, and removes it from the jurisdiction of the court, the father cannot recover damages for such abduction and detention; and hence the mother cannot be committed therefor as for a continuing contempt, under sec 23, but the misconduct can only be punished criminally. 7. The court, in such a case, ordered the mother to restore the child to the custody of the father, and pay forthwith a fine of one dollar, and to stand committed to the county jail until she should fully comply with the order. *Held*, that the order was in excess of the jurisdiction of the court, and the warrant of commitment "issued in a case not allowed by law;" and the remedy by *habeas corpus* is applicable. R. S., 1858, ch. 158, sec. 19. [RYAN, J. C., dissents, holding, 1. That the petition seeks relief against a mere *private* wrong, and this court should not take *original* jurisdiction to grant such relief, by any of the writs enumerated in sec. 3, art. VII. of the constitution. 2. That the proceedings in the circuit court in which the commitment was made, could not properly be reviewed on *habeas corpus*, by any court or officer in the exercise of *original* jurisdiction; the circuit court having had jurisdiction of the person and of the subject matter, and its order being, at most, merely *erroneous*.] 8. Whether, in such case, this court could grant the writ as an exercise of its "general superintending control over all inferior courts," not determined. Opinion by TAYLOR J.—*In re Pierce*.

MORTGAGE—REGISTRATION LAWS—NOTICE.—1. In this state, a mortgage, in whatever form, merely creates a *lien* upon the land, and the legal title remains in the mortgagor. 2. The fact that the mortgagee, who gets peaceable possession after condition broken, can not be ejected by the mortgagor before satisfaction of the mortgage, is not inconsistent with the doctrine above stated. 3. In 1870, A executed and delivered to B a deed of land, absolute on its face; and B at the same time executed and delivered to A a separate agreement under seal, witnessed and acknowledged, but not recorded, to reconvey the land to A on payment by the latter within four years of \$2,300 (which is recited to be the consideration of the deed), and such other indebtedness as might become due from A to B, with interest payable semi-annually. *Held*, that the two instruments created a mortgage. 4. In 1874, after default in payment of interest, A surrendered said contract to B, who at the same time gave A another agreement under seal, witnessed and acknowledged, but never recorded, which recited that the deed of conveyance above mentioned was for a consideration of \$3,350, and by which B agreed to re-convey the land to A, on payment by him of that sum with any other sums that might be due from him to B on note, account or otherwise, with interest payable semi-annually; the contract to become void on any default. *Held*, that this transaction did not alter the relation of the parties as mortgagor and mortgagee, and would not do so even if a mortgage in this state conveyed the fee subject to be defeated by payment of the debt. 5. After default in complying with the terms of the contract of 1874, A, in 1876, signed a writing endorsed upon a copy of said contract in B's possession, in which he stated that he had delivered his copy of said contract to his attorney, with directions to deliver it to B on a certain day in case A should not then have paid B the amount of his indebtedness (which is specified); and also stating that such delivery to B by the attorney would release to B all A's claims upon the land, and that B was then

to sell the same, and return the surplus, if any, to A. This indorsement was not sealed, nor acknowledged, and had but one witness; and there was no surrender of a note held by B for a part of A's indebtedness, and no release of the other part. *Held*, that, though intended by B to convert the mortgage into an absolute title, it was insufficient in form to transfer the title; and, even if that were otherwise, its terms would still leave B in the position of mortgagee. 6. A creditor receiving a conveyance of land from his debtor, not in satisfaction of the debt, but with power to sell the land to raise money to pay such debt, and return the surplus to the debtor, is merely a mortgagee. [17. If, upon such conveyance, the relation of debtor and creditor should cease, but the grantee should still agree to return to the grantor any sum received on a sale of the land above the amount of the debt discharged, such a transaction, if fair and free from suspicion, might be sustained as a legal trust. Per TAYLOR, J.] 8. So far as our statute declaring the effect of the want of registry of a deed as to subsequent purchasers, was adopted from any other state, it was adopted from Michigan, and not from Massachusetts. 9. One who purchases land with knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of rights claimed adversely to his vendor, is guilty of bad faith if he neglects to make such inquiry, and is chargeable with the "actual notice" he would have received. 10. The "actual notice" of an unrecorded defeasance, required by the statute to defeat a subsequent purchaser's title (R. S. 1858, ch. 86, sec. 32) does not, however, include constructive knowledge imputed from actual, open and visible occupation, where such occupation is not *in fact* known to the purchaser. 11. The possession of a grantor is presumably adverse to the grantee, where it has continued for a long time after the grant, and is inconsistent in its nature with the grantee's rights by the terms of his deed; and knowledge of such a possession on the part of a subsequent purchaser is some evidence for the jury upon the question of "actual notice" of the grantor's rights. 12. In this action (which was ejectment by B's grantee against A's grantee of the land above mentioned), it was error, upon the facts in evidence (for which see the opinion), to take from the jury the question of "actual notice" to plaintiff of defendant's rights. 13. In ejectment, where the evidence shows that plaintiff's title is in fact only a mortgage, the suit must fail, even though the defense is imperfectly pleaded. Opinion by TAYLOR, J.—*Brinkman v. Jones*.

ABSTRACT OF DECISIONS OF SUPREME COURT OF COLORADO.

December Term, 1877.

HON. HENRY C. THATCHER, Chief Justice.
" SAMUEL H. ELBERT, } Associate Justices.
" WILBUR F. STONE, }

PLEADING—COVENANTS.—1. In declaring upon a covenant, an exception, if there be any in the body of the covenant, must be set out, and the subject-matter thereof excluded from the breaches assigned. 2. Where the grantor in a deed covenanted that he was well seized, etc., and had good right to convey, etc., and then added that he would warrant and defend the grantee, her heirs and assigns against all and every person lawfully claiming or to claim the whole or any part of the premises, "except as against the United States." *Held*, that both covenants must be taken and

construed together, and that the latter restricted and qualified the first. Opinion by THATCHER, C. J.—*Dunn v. Dunn*.

BAILMENT—SURETY—SALE—MISTAKE.—1. Where one delivers chattels to another as indemnity for suretyship, the law regards such delivery as a pledge merely. Nor does it alter the case in a court of equity that the property is transferred by an absolute bill of sale, nor even if the contract stipulates that the pledge shall be irredeemable. 2. A pledgee who was surety on a promissory note transferred the property to the payee for the purpose of discharging the debt: *Held*, that the transfer did not change the status of the property, and that the pledgor had the right to redeem even after maturity. 3. A pledgee can sell only, and for the purpose of applying the proceeds to the extinguishment of the debt; such sale must be at public auction, after due notice to the pledgor or owner. 4. Where a party acts under the misapprehension that he has no title to property, a court of equity will relieve him from the legal effect of instruments which surrender such unsuspected title. Opinion by STONE, J.—*Morgan v. Dod*.

NEGLIGENCE—FELLOW-SERVANTS.—1. It is a well-settled doctrine that the master is not liable for injuries sustained by one servant through the negligence of a fellow-servant; but risks arising from the negligence of the master are not included among those which the servant is presumed to assume. 2. The master is liable for his own negligence in the selection of servants, machinery and appliances. But defects must be known to the master, or be such as should have been known to a prudent man. 3. Where it is the province of a certain employee of a railroad company to supervise repairs of defects in a railway, his negligence in respect to such defects is the negligence of the company, and notice to him of such defects as are within his province to repair, is notice to the company. 4. The general rule is that if the employee knows of the defects and continues in the service, he is deemed to have assumed the risks, and the maxim is, *volenti non fit injuria*. But if a person of ordinary prudence would not have believed the defects dangerous, he may disregard them without losing his right to complain, if he suffers from the defect while pursuing the ordinary course. 5. Notice to the master by the employee of defects in associates or material, does not necessarily fix the master's liability for injury to the employee. It is incumbent on the latter to show that there was no want of due and reasonable care upon his part; he is not exempt from the operation of the rule that one can not recover for an injury which is the proximate result of his own failure to exercise ordinary care. 6. A railroad company is not *prima facie* liable to any of its servants for injuries resulting to them because of defects in the rolling-stock or road-bed. The company is bound to that ordinary care which must be measured by the dangers of the service and proportioned to it, but it does not warrant or insure against defects. Opinion by ELBERT, J.—*Colorado Central R. R. Co. v. Ogden*.

DEDICATION TO PUBLIC USE.—1. A dedication of land to public use may be made either according to the common law or in pursuance of statute. 2. A statutory dedication operates by way of grant; a common law dedication by way of *estoppel in pais*, rather than by way of grant. 3. Where a vendee purchases a lot marked on a plat, duly recorded, of city property, the plat being referred to for a description of the premises conveyed, by a reasonable construction of the vendor's intention, the vendee is entitled to all the appurtenant advantages which the plat proclaims to exist, so far as the land embraced is owned by the grantor; the plat is a material part of the deed. 4. Where no express res-

ervation is made in an absolute deed, the most valuable estate which the vendor can sell, necessarily passes. Where platted streets are appurtenant to the land sold, it will be held that the proprietor intended the streets as public, and not as private ways. 5. Where a proprietor of urban property recognizes a plat in making sale of lots, he will be estopped to deny a dedication of the streets designated upon the plat embraced within his property to public use. And the fact that the city acquiesces in the use, by the dedicator, of the streets for a limited period, and receives taxes thereon, will not estop the city from asserting the dedication. A dedication may be made *in presenti* to be accepted by the public *in futuro*. 6. Where a statutory plat has been filed, the fee of the streets rests in the city. Where the dedication is not statutory, the fee remains in the owner, and there is nothing for which the owner is to be compensated upon the mere opening of the street to public use. Opinion by THATCHER, C. J.—*City of Denver v. Clements*.

Upon a petition for re-hearing in the above case, which was denied, the opinion was delivered by ELBERT, J.: 1. The doctrine of dedication has its origin in public convenience. Public streets are *essential* for the accommodation of town or city communities, and the proprietor must be presumed to intend what is *essential* to its enjoyment. The term *street*, used on a map of a city or town, imports a *public way* for the free passage of its trade and commerce. 2. An actual intent to reserve any portion of the lands platted into streets, otherwise than by express reservation on the plat, should be made manifest with as equal certainty and publicity as the plat. Actual intent can not be permitted to avail against an intent shown by unequivocal acts upon which the public have a right to rely. 3. Where the fee of the street remains in the dedicator, and his use and occupancy of the ground covered by the easement is acquiesced in by the city, a tax thereon will be justified and rendered equitable.—*Id.*

CORRESPONDENCE.

NEGOTIABLE PAPER—EXTENT OF RECOVERY.

To the Editor of the Central Law Journal:

In the course of my professional investigations not long since, I took up Vol. 1, No. 2, of the *Southern Law Review*, in which I found an article from the pen of Mr. J. W. Daniel, the author of *Daniel on Negotiable Instruments*. At page 234, sec. 20, appeared just what I wanted, but what, to my mind, has never been considered as sound law. Mr. Daniel cites a large number of cases which, fortunately, were accessible, and to which recourse was had. The writer says: "As to the extent of the recovery by the *bona fide* holder for value, if the defense be want or failure of consideration between the original or intermediate parties, he may still recover the whole amount of the bill or note, although he purchased it at a considerable discount—greater than legal interest; but if the defense be that the bill was uttered in fraud, or was lost or stolen, then even such a holder can only recover what he advanced for it." The italics are my own, and the statements made therein are, to my mind, not only unsound, but decidedly dangerous. To the country practitioner whose library is limited, are they eminently so.

What gives value to a legal article is the soundness of its matter, supported by the authorities cited. Mr. Daniel cites a large number of decisions, both from our own and the mother country, not one of which supports the doctrine of his text. Is it not a new doctrine that if no consideration move, a *bona fide* holder

for value may yet recover; but if the defense be *fraud* he may recover to the extent of his interest—i. e., what he paid for it, and no more? It is a well established principle of law that a *bona fide* holder for value, and without notice of existing equities, may recover, whether the defense be fraud, want or failure of consideration. There is a class of cases where there can be no recovery at all—for example, forgery, or such fraud as renders the note absolutely void at its inception, but in such cases the recovery is defeated entirely. There is no *pro tanto* recovery. *E converse*, where the fraud does not make the note void but only voidable, a *bona fide* holder may recover the whole amount if indorsed by him before maturity and without notice.

The cases cited by Mr. Daniel do not, either directly or by implication, sustain him. He says if the defense be that the bill was uttered in fraud, then even a *bona fide* holder can only recover what he advanced for it. He cites *Chicopee Bank v. Chapin*, 8 Met. 49. That was *assumpsit* by the indorsees against the indorser. The indorsees held it as collateral security for a pre-existing debt. The indorser pleaded that he was only an accommodation indorser, that it was intrusted to the promisor for a special purpose, and that in violation of his trust he negotiated it to plaintiff. Under these circumstances the court held that the recovery must be limited to the amount for which plaintiff held it as collateral security. Nor would plaintiff upon any principle of justice be entitled to more. The holder of a collateral is only the owner to the extent of his demand secured thereby. The surplus belongs to his debtor and to him must he account for it. Were it otherwise, the indorser would be enabled to collect the surplus, indirectly, that he could not by a direct proceeding,—a thing that the law will not permit.

Bond v. Fitzpatrick, 4 Gray, 87, is another of Mr. Daniel's cases. That was an action upon a promissory note indorsed in blank. It was past due when so indorsed. No such question as that suggested in the text arose. Dewey, J., who delivered the opinion of the court, used this language: "But if, from other and competent sources, it appears that the interest of the plaintiff was a limited one, and that a less sum than the amount of the note in suit will fully discharge all his just claims thereon, and that in fact he held a portion of the note in trust for Doherty, it would be competent for the jury to reduce the damages to the amount of the plaintiff's interest, and exclude the balance of the note, or there existed an equitable set-off, as against him, as to the balance." Again, in *Williams v. Smith*, 2 Hill, 301. In this case the plaintiff held the note as collateral security transferred to him before maturity, for a valuable consideration. The court decides that he is a *bona fide* holder, but can only recover what is due him on the paper he had indorsed, and for the security of which the collateral was held.

Valette v. Mason, 1 Smith, (Ind.) 89, was also a case where the holder only had a contingent interest, he having taken the same as collateral security. He was allowed to recover to the extent of his interest, and no more. The case falls far short of sustaining Mr. Daniel's text. It decides what every country lawyer knows, that the holder of a collateral, when he brings suit upon it, can only recover to the extent of his interest, if the defendant urges existing equities; and if not, then he may recover the whole, and the surplus will enure to the benefit of the payee. *Allaire v. Hartshorne*, 1 Zab. 665, is another case where the authority cited in no way supports the author's theory. The note was deposited with the plaintiff as collateral security for a pre-existing debt. The plaintiff was the owner of the note only to the extent of the debt secured thereby. Like every other case resting upon similar facts, the interest of the pledgee was only to

the extent of the indebtedness due from his pledgor. The very gravamen of his action was his right to recover a sum sufficient to make him whole, he being liable to pay the debt of his indorser. The payee could recover nothing, for the reason that as between him and the maker the note was invalid. The plaintiff could, and did recover, because he was a *bona fide* holder for value, and without notice of existing equities.

Holeman v. Hobson, 8 Humph. 127, decides that fraud or want of consideration is no defense for either the maker or accommodation indorser, as against a *bona fide* holder for value to whose possession it came before maturity, in due course of trade, without notice. The same case decides that in the case of a gift of a negotiable note, and the donee afterwards transfers it by indorsement for less than its value, or a wholly inadequate consideration, but in good faith, his indorsee can recover from a prior party only what the indorsee paid for it. It is a general principle of law that a gift of negotiable paper, that not being the use for which the law intended, is not such a negotiation as will protect the holder against existing equities. The same principle is true of an assignment. The assignee is not protected against existing equities.

The English cases cited by the writer of the article do not bear out the statements in the text. He cites *Robins v. Maidstone*, 4 Ad. & El. 811, to sustain his text. That was a case where a note was given to payee to raise money for defendant. Indorser paid £200, and took note in pledge. Subsequently he brought suit and recovered the whole sum. Lord Denman intimated that if a defense had been interposed, the judgment might *probably* have been limited to the amount advanced. *Edwards v. Jones*, 7 Carr & Payne, 633, is relied upon to sustain the text. In that case the plaintiff was allowed to recover £49 on a note for £100, being amount paid by him. The defense was that it was agreed between him and the payee, at the time of making the note, that the note was to be paid by his carrying goods for the payee, and that it was indorsed to the plaintiff *without consideration*. The plaintiff pleaded in reply that he gave a consideration of £49 for it. The court held that on this issue the defendant must begin, and that, if he offers no evidence, the plaintiff was entitled to a verdict for £49. More than this, the case does not decide. The only remaining case to be noticed is *Wippen v. Roberts*, 1 Esp. 261. The point established by that decision is directly in opposition to that stated by Mr. Daniel. Lord Kenyon said: "Where a bill of exchange is given for money really due from the drawer to the drawee, or is drawn in the regular course of business, in such cases the indorsee, though he has not given the indorser the full amount of the bill, yet may recover the whole and be the holder of the overplus above the sum really paid to the use of the indorser; but where the bill is an accommodation one, and that known to the indorsee, and he pays but part of the amount, in such case he can only recover the sum he has actually paid on the bill." There is no doubt in my mind that the cases cited by Mr. Daniel are conclusive of the point that he has not stated the law correctly; and, while searching for authorities, he may as well have cited *Bardell v. Pickwick*, as *apropos*, for that celebrated case supports his text quite as well as do those cited by him. The class of cases which hold that the holder of a promissory note may only recover the amount advanced upon it, are all cases where the transferee is not a purchaser in the ordinary course of business. Such are the cases reviewed. In my search for cases I only find one directly in point, though there exists a long line of decisions, both in this country and in England, which settle the law beyond all controversy, directly opposite to the statement of Mr. Daniel. Remembering that Mr. Daniel says, where the note is uttered in

fraud, the holder, though *bona fide*, is limited to the sum paid, and it will be seen how well the case found is in point. *Lay v. Wissman*, 36 Iowa, 305, was an action on a promissory note for \$150, executed by one Corey, and indorsed without recourse. Among the defenses interposed was that the note was obtained by *fraud* without any consideration moving, and that plaintiff paid therefor the sum of only \$80. In that case the court holds that the defense is not good, and Day, J., who delivered the opinion, uses this language: "The defense, that a note has been obtained fraudulently, or without consideration, does not avail against a *bona fide* holder. If, however, the recovery of such holder may be limited to the amount paid, it is apparent that the defense *does* avail, for, without such a defense he could recover the amount evidenced by the note." One of the essential elements of commercial paper is that those who deal in it may be allowed to fix its value. That value, of course, depends upon the responsibility of the maker, and his ability to pay. Commercial paper is a medium of exchange, and, is like a bank note, whose value depends wholly upon the degree of faith we have in the bank that issued it. If A be good, his note may be at par, but if there exists a doubt as to his responsibility, the value of his paper must depend upon the faith of him who holds it in the integrity of the maker, or the degree of faith the holder has in his ability to enforce its payment by a resort to legal proceedings. Mr. Daniel's proposition of law is so manifestly without precedent to support it that a sense of duty impels its exposition. He who would instruct ought always be sure that his theories are sound. Particularly is this true of a law writer.

KANSAS CITY, Mo.

A. H. K.

BOOK NOTICE.

CASES ARGUED AND DETERMINED IN THE ST. LOUIS COURT OF APPEALS of the State of Missouri. Reported by A. MOORE BERRY, official reporter. Vol. III. St. Louis: F. H. Thomas & Co., 1878.

In a rather lengthy review of the former volumes of this series of reports (see 6 Cent. L. J. 419), we said all that we could desire to say concerning the volume before us. We have had no occasion to change the opinion then expressed, and the manner of reporting criticised is here followed to the letter. On pages 100, 101, 102, 159, 160 and 161, this style of reporting is to be seen at its worst. The book contains 661 pages, with a good index. The opinions here reported were delivered between the 3d of July, 1876, and the 24th of April, 1877. Abstracts of many of the cases have appeared from time to time in these columns, and it is therefore not necessary to enumerate them. Both the printing and binding of the book are admirable.

QUERIES AND ANSWERS.

QUERIES.

61. APPOINTMENT OF RECEIVER AFTER DECREE.—Bill in equity by mortgagee for foreclosure of a mortgage in United States Circuit Court, not praying for the appointment of a receiver, nor alleging scanty security, is taken *pro confesso*, decree of sale entered and premises sold to mortgagee, pursuant thereto. The security proves inadequate, and the sale realizes only a part of mortgage debt, leaving a large deficiency. The mortgagor is insolvent. May the complainant, by proceedings in the same action, procure the appointment of a receiver of the rents and profits of the mortgaged premises during the redemption year, for the pur-

pose of having the same applied in payment of deficiency? O.

62. WITNESS—PROMISE TO PAY FOR EVIDENCE.—

—An important witness in a case was about to leave the state. His deposition could have been taken, but at that time he could not have been subpoenaed to attend the trial, which would not take place for several months. In consideration of his remaining and testifying at the trial to the facts within his knowledge, the plaintiff agreed to give him one-third of whatever was recovered in the action. Can the contract be enforced, or is it void, as being contrary to public policy? In this state champerty does not avoid a contract, nor does interest exclude a witness. B.

[We think it clear that such a contract could not be enforced.—ED. CENT. L. J.]

ANSWERS.

No. 51.

[7 Cent. L. J. 159.]

The amendment approved February 28 will prevail. From the frame of the query, in the jurisdiction involved therein, the executive department is a component part of the law-making power, and no enactment of the legislative department has force as law until it receives such approval. Consequently, the approval of February 28 was the latest expression of the law-making power in its entirety, and must prevail in case of conflict. *King v. Justices of Middlesex*, 2 B. & Ad. 518; *Ham v. State*, 7 Blk. 214; *Stevens v. State*, 5 Ind. 46. C. & B.

Vincennes, Ind.

No. 59.

[7 Cent. L. J. 199.]

Yes. The board of supervisors and the county treasurer are alike agents of the county, and the acts or neglect of one agent can not affect the liability of another or his sureties to the common principal. Board of Supervisors v. Otis, 62 N. Y. 88. If all county officers unite in violation of law, and rob the treasury of its contents, the illegal act of one will afford no shield against the legal responsibility of the others or of their sureties. *County of Muscatine v. Carpenter*, 33 Iowa. 44. W.

NOTES.

BENJAMIN H. BRISTOW has removed to New York, and commenced the practice of his profession in that city.—The question of the unconstitutionality of the United States law of 1871, as to the appointment of federal supervisors of election, has been raised in the United States Circuit Court at Cincinnati.—David Dudley Field, of New York, was chosen president of the Association for the Reform and Codification of the Law of Nations, held last month at Frankfurt.—Mr. Justice Keogh has recovered from his attack of insanity. He fully comprehends the acts he committed during the crisis of his illness.—King's Inns, Dublin, have had a correspondence with the Four Inns of Court, London, relative to a proposal of their own that increased facilities be given for the call of Irish barristers to the English bar, and of English to the Irish bar. The answer they got was curtly in the negative. The committee appointed by the English barristers to inquire into the matter reported that there had been no reason suggested to them, nor were they aware of any reasons appearing, to call for so great a change in the constitution of the English bar, and they were accordingly of opinion that the suggestion made should not be accepted.